TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. [illegible]

[illegible] NORTHERN RAILWAY [illegible]

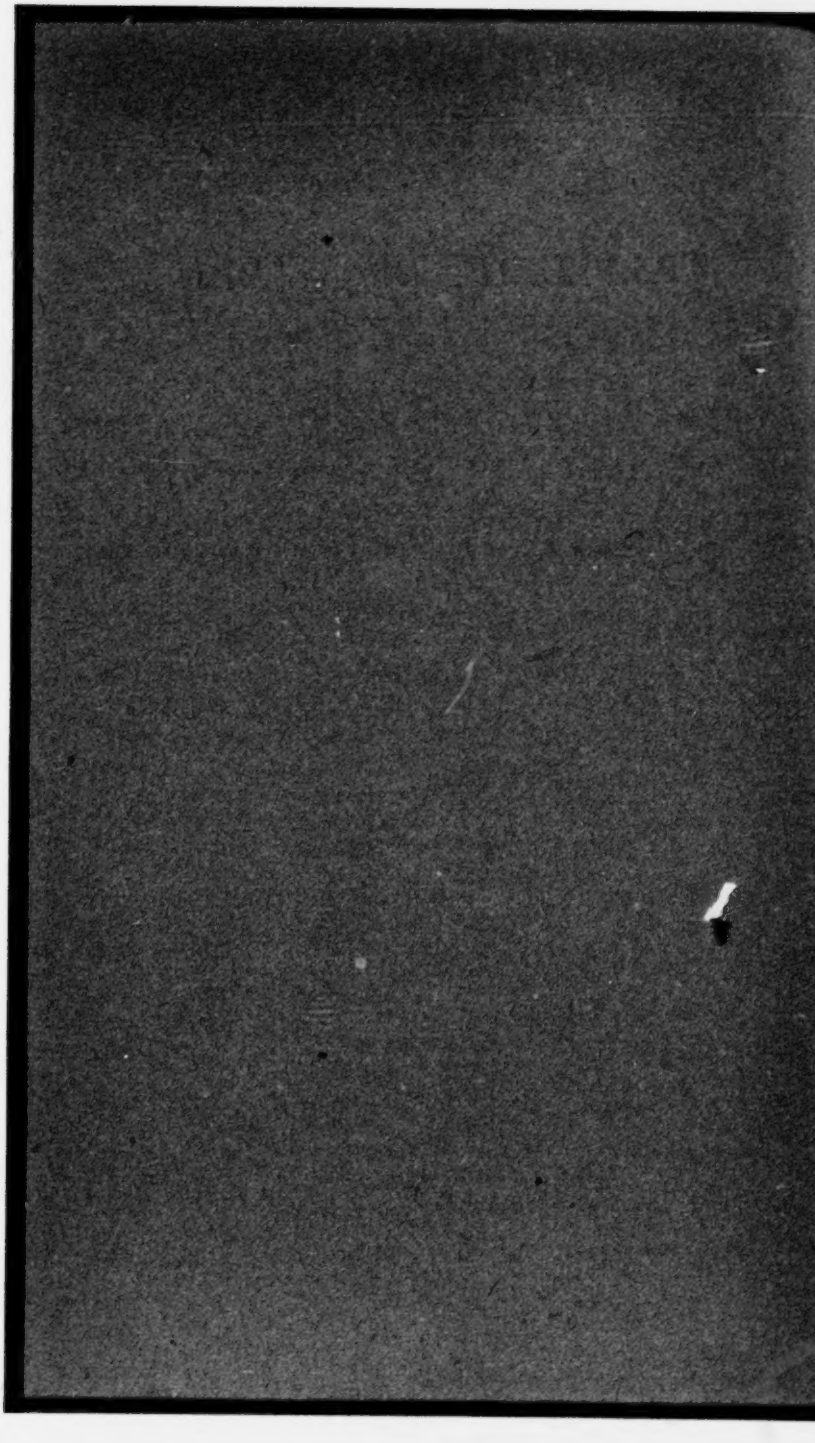
vs.

JAMES A. HOWER, RECEIVER OF [illegible]
LYDA H. HOWER, EXECUTRIX OF [illegible]
AND ASHEL CONSOLIDATED [illegible]

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED [illegible], 1927

(28,479)



sold and conveyed to the Great Northern Railway Company, Plaintiff herein, its several lines of railway, including those in the State of Washington, also all its right, title and interest in and to said N. E. ¼ of Section 2, Township 27 North, Range 10 East, whereby the plaintiff became and now is the equitable owner of the said land.

XXIII.

That said land is vacant and unoccupied.

XXIV.

That the defendants Nicholas H. Rudebeck and James McCreery Realty Company claim, and each of them claims, some interest in and to the above described premises. That such interest that said defendants, or either of them, have, if any they have, is
13 subsequent, subordinate and inferior to the claim of the plaintiff herein.

Wherefore, Plaintiff demands judgment:

(1) That it is the owner of the above premises and that the defendants have no right, title, interest or estate therein.

(2) That the defendants be adjudged, decreed and required to convey to plaintiff by good and sufficient deed or deeds the legal title to said premises, or that the judgment of this Court stand in lieu of such conveyance.

(3) For its costs and disbursements herein, and such other and further relief as the plaintiff may be entiled to in law and in equity.

L. C. GILMAN,
Attorney for Plaintiff.

P. O. Address: 302 King Street Passenger Station, Seattle, King County, Washington.

STATE OF WASHINGTON,
County of King, ss:

L. C. Gilman, being first duly sworn, upon oath says: that he is the statutory agent of the Great Northern Railway Company, the plaintiff named in the above entitled action; that he has read the foregoing amended complaint, knows the contents thereof, and that he believes the same to be true; that he makes this affidavit because he is authorized to verify the pleading of said defendant, and this amended complaint.

L. C. GILMAN.

Subscribed and sworn to before me, this 13th day of August, A. D. 1908.

L. FRANK GORDAN,
Notary Public in and for the State of Washington, Residing at Seattle.

Endorsed: Filed Aug. 14, 1908. John R. Dally, County Clerk.

14 In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff and Appellant,

v.

JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants and Respondents.

Appeal Bond.

Know all men by these Presents: That we, the Great Northern Railway Company, a corporation, plaintiff in the above entitled action, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto James A. Hower, individually and as trustee, Anna A. Hower, wife of said James A. Hower, Nonpareil Consolidated Copper Company, a corporation, Nicholas H. Rudebeck, and James McCreery Realty Company, a corporation, defendants in the above entitled action, in the penal sum of Two Hundred Dollars ($200.00), lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, successors or assigns, for which payment well and truly to be made, we bind ourselves, our and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 1st day of September, 1911.

The condition of the foregoing obligation is such that, whereas, on the 15th day of July, 1911, in the above entitled action the above entitled court rendered judgment *judgment* dismissing said action, upon sustaining the demurrer of said defendants to

15 the amended complaint of the plaintiff herein, And whereas the said plaintiff, Great Northern Railway Company, the principal in this obligation, feeling aggrieved by said judgment, has taken an appeal therefrom to the Supreme Court of the State of Washington.

Now, Therefore, if the said plaintiff, Great Northern Railway Company, shall well and truly pay all costs and damages that may be awarded against it on appeal, or on the dismissal thereof, not exceeding Two Hundred Dollars ($200.00), then the foregoing obligation shall be void; otherwise to remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY, [SEAL.]

By F. G. DORETY, *Assistant Attorney.*

[SEAL.] NATIONAL SURETY COMPANY, [SEAL.]

By GEO. W. ALLEN, *Attorney-in-Fact.*

We hereby acknowledge service of the foregoing Bond and the receipt of a true copy thereof, this 2nd day of Sept., 1911.

J. A. COLEMAN,
Attorney for All Def'ts Except Nicholas H. Rudebeck.
HATHAWAY & ALSTON,
Attorneys for Nicholas H. Rudebeck.

Endorsed: Filed Sep. 7, 1911. W. F. Martin, County Clerk.

16 In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Demurrer to Amended Complaint.

Come now the above named defendants James A. Hower, individually and as trustee, Anna A. Hower, wife of said James A. Hower, Nonpareil Consolidated Copper Company and James McCreery Realty Company, and appearing herein by Brownell & Coleman, their attorneys demur to the amended complaint herein on the following grounds:

I.

On the ground that the Court has no jurisdiction of the subject matter of the action.

II.

On the ground that the plaintiff has no legal capacity to sue.

III.

On the ground that there is a defect of parties defendant, in that the original patentee, Carter, described in the Amended Complaint should be made a party.

IV.

On the ground that the Amended Complaint does not state facts sufficient to constitute a cause of action.

V.

On the ground that the action has not been commenced within the time limited by law.

BROWNELL & COLEMAN,
Attorneys for the Above-named Def'ts.

17 Copy of within Demurrer received, and due service thereof acknowledged, this 14th day of September, 1908.

L. C. GILMAN,
Attorney for Plaintiff.

Endorsed: Filed Sep. 15, 1908. John R. Dally, County Clerk.

18 In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff.

vs.

JAMES A. HOWER, Individually and as Trustee; —— HOWER, Wife of said James A. Hower, and Nonpareil Consolidated Copper Company, a Corporation, Defendants.

Demurrer.

Comes now the above named defendants and appearing herein by Brownell & Coleman, their attorneys, demur to the complaint herein on the following grounds:

I.

On the ground that the Court has no jurisdiction of the subject matter of the action.

II.

On the ground that the plaintiff has no legal capacity to sue.

III.

On the ground that there is a defect of parties defendant, in that the original patentee, Carter, described in the Complaint should be made a party.

IV.

On the ground that the Complaint does not state facts sufficient to constitute a cause of action.

V.

On the ground that the action has not been commenced within the time limited by law.

BROWNELL & COLEMAN,
Attorneys for Defendants, Office and P. O. Address, Colby Building, Everett, Snohomish Co., Wash.

19 Copy of within Demurrer received, and due service thereof acknowledged, this 10th day of April, 1908.

L. C. GILMAN,
Attorneys for Plaintiff.

Endorsed: Filed Apr. 14, 1908. John R. Dally, County Clerk.

20 In the Superior Court of the State of Washington for Snohomish County.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Order Sustaining Demurrer.

This cause came on regularly for hearing on the 24th day of June, 1911, before the Honorable W. P. Bell, a Judge of the above entitled court at the courthouse in the city of Everett, Snohomish County, Washington, upon the demurrer of the defendants to the amended complaint, and plaintiff appearing by its attorney F. G. Dorety and the defendants appearing by their attorney J. A. Coleman, and the matter having been submitted to the court upon the written briefs of counsel for the plaintiff and counsel for the defendants, and the court having duly considered the matter and being fully advised therein,

It is ordered and adjudged that said demurrer be and the same is sustained, to which order and ruling of the court the plaintiff excepts and its exception is allowed.

Dated this 29th day of June, 1911.

W. P. BELL, *Judge.*

Endorsed: Filed Jun- 29, 1911. W. F. Martin, County Clerk.

21 In the Superior Court of the State of Washington for Snohomish County.

No. —.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Order of Dismissal.

The Court having heretofore sustained the demurrer of the defendants to the amended complaint, and the plaintiff having declined to plead further, now on motion of the defendants:

It is considered ordered and adjudged that the above entitled action be and the same is hereby dismissed.

And it is further considered ordered and adjudged that the defendants have and recover of and from the plaintiff their costs and disbursements herein to be taxed.

Dated this 15th day of June, 1911.

W. P. BELL, *Judge.*

Plaintiff excepts and the exception is hereby allowed.

W. P. BELL, *Judge.*

O. K. as to form
F. G. DORETY.

Endorsed: Filed Jul- 15, 1911. W. F. Martin, County Clerk.

22 In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

v.

JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation. Defendants.

Notice of Appeal.

To the above named defendants, James A. Hower, individually and as trustee; Anna A. Hower, wife of said James A. Hower; Nonpareil Consolidated Copper Company, a corporation, and James McCreery Realty Company, a corporation, and to Messrs. Brownell & Coleman, their attorneys; and to the above named defendant, Nicholas H. Rudebeck, and to Messrs. Hathaway & Alston, his att'ys:

You and each of you, will please take notice hereby, that the plaintiff in the above entitled action, the Great Northern Railway Company, feeling aggrieved by the judgment rendered therein, does hereby appeal from said judgment to the Supreme Court of the State of Washington. The Judgment appealed from is the final judgment in the above entitled action, rendered by the above entitled court on the 15th day of July, 1911, dismissing said action upon sustaining defendants' demurrer to the amended complaint of the plaintiff herein; and this appeal is taken from each and every portion of said judgment, and from the whole thereof.

Dated at Seattle, Washington, this 31st day of August, 1911.

F. V. BROWN,
F. G. DORETY,
Attorneys for Plaintiff.

23 We hereby acknowledge service of the foregoing Notice and the receipt of a true copy thereof, this 2nd day of Sept. 1911.

J. A. COLEMAN,
Attorney for All Def'ts Except Nicholas H. Rudebeck.
HATHAWAY & ALSTON,
Attorneys for Nicholas H. Rudebeck.

Endorsed: Filed Sep. 7, 1911. W. F. Martin, County Clerk.

24 In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
v.
JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; and Nonpareil Consolidated Copper Company, a Corporation, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and defendants, that the plaintiff may amend its complaint herein, and make as parties defendant to this suit Nicholas H. Rudebeck and James McCreery Realty Company, a corporation, and that the demurrer filed by the defendants herein to the plaintiff's complaint shall stand and be considered as a demurrer to the said amended complaint.

Dated this 12th day of August, A. D. 1908.

L. C. GILMAN,
Attorney for Plaintiff.
BROWNELL & COLEMAN,
Attorneys for Defendants.

Endorsed: Filed Aug. 15, 1908. John R. Dally, County Clerk.

25 In the Superior Court of the State of Washington in and for the County of Snohomish.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Certificate of Transcript.

I, W. F. Martin, Clerk of the Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much

of the record and files in the above entitled cause as I have been directed by the Appellant to transmit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court this 7 day of Oct. 1911.

W. F. MARTIN, *Clerk*,
[SEAL.] By CHAS. H. TICKEL, *Deputy*.

26 Filed Dec. 26, 1911. C. S. Reinhart, Clerk. F.

In the Superior Court of the State of Washington for Snohomish County.

10018.

No. —.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Stipulation.

In passing upon the demurrer to the amended complaint, it is stipulated that the court may consider the decisions of the Land Department, referred to in the amended complaint, namely:

The decision of the Register and Receiver of August 28, 1903.

The decision of the acting Assistant Commissioner of March 23, 1904.

The decision of the Register and Receiver of January 21, 1905.

The decision of the acting Commissioner of June 30, 1905.

The decision of the Secretary of the Interior of November 23, 1905, and that the annexed are true copies of said decisions.

L. C. GILMAN,
F. V. BROWN &
F. G. DORETY,
Attorney- for Plaintiff.
J. A. COLEMAN,
Attorney for Defendants.

27 Copy.

DEPARTMENT OF THE INTERIOR.

United States Land Office, Seattle, Washington.

MELVIN J. CARTER, Contestant,
vs.
ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY CO., Contestee.

Involving N. E. ¼ Sec. 2, Twp. 27 N., R. 10 E.

On April 6th, 1894, the St. Paul, Minneapolis and Manitoba Ry. Co. filed its List No. 3 of selections in the township above described, which list included the lands above described. On April 11, 1899, at 9 o'clock A. M. the plat of said township No. 27 North of Range 10 east, was duly filed in this office and at said date the lands in said township belonging to the United States, which included the lands above described, became subject to entry under the regulations of the department, and on said 11th day of April, 1899, the said St. Paul, Minneapolis and Manitoba Railway Co. filed its list N-. 24 supplemental to said list No. 3. On April 17th, 1899, Melvin J. Carter, the homestead claimant in this case filed his homestead application for the tract of land above described, wherein he alleges, among other things, that he settled thereon on the 1st day of December, 1893, and that he had resided thereon continuously ever since such time and had improved said lands to the value of $500.

On May 27th, 1899, a hearing was ordered and the case was set for trial before the Register and Receiver of this office on the 22nd day of August, 1899, for the purpose of determining the respective rights of the claimants to said land, and notice of said hearing was duly issued. On August 22, 1899, a stipulation by Joseph W. Gregory as attorney for homestead claimant and Thomas R. Benton as attorney for the St. Paul, Minneapolis and Manitoba Ry. Co. was filed herein continuing said cause to Oct. 8, 1900, at 10
28 o'clock A. M. October 8, 1900 upon stipulation filed by said parties, by their said attorneys, the case was again continued subject to twenty days' notice by either party. April 7, 1903, upon motion of the attorney for the St. Paul, Minneapolis, and Manitoba Ry. Co., the hearing of said cause was again set for the 26th day of May, 1903, at 10 o'clock A. M. at which time both parties appeared by their said attorneys, and by reason of the pendency of other business before the Land office, the case was again continued to June 1st, 1903, at 10 o'clock A. M. at which time said parties appeared with their said attorneys and witnesses and a hearing duly had as shown by the record of the Clerk herein filed.

The only question involved in this case is, Did the homestead claimant, in good faith, settle and establish his residence on the land in question prior to the time the St. Paul, Minneapolis & Mani-

toba Ry. Co. made their selections of the same, and if so did he maintain such residence and improve the same up to the time of the filing of the said homestead application? The evidence shows that the homestead claimant purchased the improvements of the former settler on this land; that he went upon the land himself and began the work of improving the same on the 19th day of Sept. 1893; that he lived in the old cabin of the former settler and at once went to work to build a new house during the fall and winter of 1893 and 1894 and had the same finished by the following spring, at which time he moved his family, consisting of his wife and daughter, on to the land and into his new house which they continued to add to and improve and succeeded in furnishing quite well with household and kitchen furniture. The settler himself did not remain on the homestead continually being away at work earning a living for a considerable portion of the time, but his plucky wife was there during all of these years, except during the winter months when she was compelled to leave on account of the heavy snows and high waters. She fixed up the house, assisted personally in clearing up the lands, planted fruit trees, small fruits, flowers and
29 shrubbery about the place, raised vegatables, berries and small fruit on the place, furnished their house far better than the average homesteader and through the energy, industry and perseverance of Mrs. Carter, their home became and is known as a model of comfort and hospitality. There can be no question but that the law has been complied with, both as to residence and improvement of the place, and that the commencement of such residence and improvements dates prior to the location of the said railway company, but it is contended on the part of the railway company that the settler forfeited his rights and is estopped to claim the land by reason of the fact that in the fall of 1896 and again in 1898 he registered and qualified as a voter in the City of Seattle, and for that purpose made affidavit that he was then and for a long time prior had been a resident of King County and the City of Seattle. It is contended by counsel for the homestead claimant that the party named in the exhibits is not identified as the homestead claimant in this case but we think that his own admissions sufficiently identify him with the exhibits. There is no doubt but that the claimant violated either the U. S. Homestead laws of else the location laws of the State of Washington when he registered and qualified as a voter in the City of Seattle, and were it not for the exceptionally good showing made as to their compliance with the homestead laws, we would be inclined to locate the fraud on the side of the homestead, which we believe is true in a majority of cases, but in this case the evidence shows that at the time he registered, his family was actually living on this homestead, inhabiting the land where they had lived for several years before and have lived ever since during all of the time that was possible for them to remain thereon; and since his wife, has devoted more than eight years of the best of her life enduring privations and hardships incident to a life on a frontier mountain homestead, performing most of the labor and drudgery

of improving and cultivating it herself in order that they
30 might ultimately acquire title to the land under the homestead laws, and since under the homestead laws of this state, she will have an equal interest with her husband therein when title is thus obtained, we do not believe it would be in accordance with the spirit or intent of the homestead law, to deprive her of it solely because her husband's interest in political matters in the City of Seattle made him do what he should not have done, very much to the prejudice of his own and especially his wife's interests in this homestead claim.

We therefore hold and decide that the homestead application of Melvin J. Carter should be allowed and that the application of the St. Paul, Minneapolis and Manitoba Ry. Co. to select the same under the Act of August 5, 1892, be and the same is hereby rejected.

Dated this 28th day of August, 1903.

J. HENRY SMITH, *Register.*
LYMAN B. ANDREWS, *Receiver.*

31 Copy.

15–14072.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
"F." WASHINGTON, D. C., *March* 23, 1904.

Decision.

Register and Receiver, Seattle, Washington.

SIRS: I have considered the testimony received with your letter of October 30, 1903, in the case of Melvin J. Carter v. St. Paul, Minneapolis & Manitoba Railway Company, involving the N. E. ¼ Sec. 2 T. 27 — R. 10 E.

On April 6, 1894, prior to survey the Railway Company selected this tract under the Act of August 5, 1892, per List 3.

On April 11, 1899, the plat of survey became filed in your office and on the same day the company filed its list No. 34, adjusting its selection to the public surveys.

On April 17, 1899, Melvin J. Carter filed his homestead application for the tract in question alleging settlement thereon December 1, 1893, and continuous residence thereon since that time with improvements valued at $500.00.

Upon the showing, you ordered a hearing in the case, which after several continuances was held June 1, 1903.

From the evidence you find that the homestead claimant purchased the improvements of the former settler; that he went upon the land and began work improving same on September 19, 1893; that he lived in the cabin of the former settler and at once went to work building a new house, which he had finished in the spring of 1894, when he moved his family, consisting of his wife and daughter, into it and has continued to add to it and improve it and has it

furnished quite well with household and kitchen furniture; that the settler himself did not remain continuously on the homestead, being away at work earning a living, for a considerable portion of the time, but that his wife, remained on the place all of the time
32 except in the winter months when she was compelled to leave on account of heavy snows and high water; that she fixed up the house, assisting personally in clearing up the lands, planted fruit trees, small fruits, flowers and shrubbery about the place raised vegetables, berries and small fruits, furnished the house far better than the average homesteader and made a home which is a model of comfort and hospitality; that there can be no question that the law has been complied with both as to residence and improvement and that such residence and improvement dates prior to the selection of the railway company; but that it is contended on the part of the company that the settler forfeited his rights by the fact that in 1896 and again in 1898 he registered and qualified as a voter in the city of Seattle, and upon this point you say there is no doubt the homestead claimant violated either the homestead laws or else the election laws of the State, and that were it not for the exceptionally good showing made as to compliance with the homestead laws; you would be inclined to locate the fraud on the side of the homestead, but that in this case the evidence shows that at the time he registered his family was actually living on the homestead inhabiting the land where they had lived for several years before and have lived ever since during all of the time it was possible for them to remain thereon; and since his wife has devoted more than eight years of the best part of her life enduring privations and hardships incident to a life on a frontier mountain homestead, performing most of the labor and drudgery of improving and cultivating it herself in order that they might ultimately acquire title to the land under the homestead laws, and since under the State homestead laws she will have an equal interest with her husband therein when title is obtained, you do not believe it would be in accordance with the spirit or intent of the homestead law to deprive her of it solely because her husband's interest in political matters in Seattle made him do what he should not have
33 done, very much to the prejudice of his own and especially his wife's interest in the homestead claim.

You therefore hold and decide that the homestead application of Carter should be allowed and the selection of the Company rejected.

From the decision the company appeals in general from the finding that Carter purchased the improvements on the land of a prior settler or even settled upon or reside- upon the land or ever moved his family thereon or that he ever cleared, improved or cultivated any part of the land and insists that you should have found that Carter's house and improvements are situated on the bank of the North Fork of the Skikomish River within 300 feet thereof and more than three-eighths of a mile from the land in controversy.

That you should have held, because of Carter's registering and voting in 1896 and 1898 in Seattle that he was then and for several

years prior thereto, a resident of said city and abandoned any claim to residence in the county in which the land is situated and finally that you erred in applying the State homestead laws to the case and holding that under said law, Carter could not abandon or relinquish his claim under the homestead laws of the United States without the consent of his wife.

Upon examination of the testimony, I concur with your finding as to the settlement of Carter upon his land in the fall of 1893, his commencement of residence thereon with his family in the spring of 1894, and that since said time the land has been their home and that while Mr. Carter was not there continuously, his absence was entirely on business; that Mrs. Carter and her daughter would usually leave when the winter set in because of the snows and high waters and would stop sometimes with her mother in Seattle and at other places, but always returned in the early spring; that in fact this was their home and they had no other.

34 The company, however, insists that because in 1896 and 1898 Carter, for voting purposes, alleged his residence in Seattle where he then was, he could not hold the land as his home. The fact, however, as shown by the evidence is that the land was the home of himself and family, to which he came whenever his business permitted, and here his family lived.

It is the experience of this office that settlers generally do not understand that the assertion of a residence in a given place, where they may be temporarily engaged in business, for the purpose of voting, effects their actual residence on their homestead located in other voting precincts and it is not an unusual incident in these contests for such issues to be raised, but the Department has held that where the settler shows his actual home to have been on the land claimed, and has shown compliance with the law in the matter of residence and cultivation, such voting tends to show an illegal act rather than a change of domicile:

James Edwards, 8 L. D. 353.
State of California vs. Sevoy, 9 L. D. 139.

I give no weight, therefore, to this point presented by the company.

There is one other question which you have not considered in your decision, but which is presented in the appeal, to-wit: that the house and improvements of Carter are not on this land on dispute.

The evidence on this point is that given on cross examination of the witnesses for Carter, but it is all a matter of conjecture; no surveys or measurements were made, each witness giving what he thinks are the distances from the several points referred to, and none of the witnesses fully agree in the matter.

Mr. Carter, the applicant, puts the cabin at 20 rods from the Skikomish River and about one-half mile below the mouth of Trout Creek.

Mr. Gunn says the mouth of Trout Creek is about one-half
35 mile above the cabin, that a certain tram road is within 50 feet of the cabin; that it is half a mile from the house to

the creek; that the road runs almost straight past Carter's place, strikes the creek about twenty rods from the mouth, crosses, turn-to the right, and runs up the creek; that the cabin is about 200 feet from the Skikomish River, the tram road running between the cabin and the river about 200 feet to the north of the quarter corner of Sec. 2, and that the cabin is situated about one-half mile from where the road crosses the creek.

Mr. Hubbard says the cabin is about one-half mile from the mouth of Trout Creek, about 200 or 300 feet from the river and 50 or 75 feet from this tramway.

This evidence tends to place the improvements on the N. W. ¼ while all the witnesses testify to the claim as being on the N. E. ¼.

In view of the uncertainty upon this point, a further hearing is ordered, with notice to both parties, that it may be clearly shown on what quarter section the improvemnts are situated.

You will confine the hearing strictly to this one matter, as I concur in your finding that Carter has shown compliance with the law and is entitled to make entry of the tract on which he was actually living.

Let the hearing be held as early as practicable, and promptly forward the record with your finding on the evidence.

Very respectfully,

(Signed) J. W. MACY,
Acting Assistant Commissioner.

M. I. P.

36 **Copy.**

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE,
SEATTLE, WASHINGTON.

MELVIN J. CARTER
vs.
ST. PAUL, M. & M. RY. CO.

Involving the N. E. ¼, Sec. 2, Township 27 N., R. 10 E., W. M.

Decision.

The St. Paul, Minneapolis, and Manitoba Ry. Co. filed its list of selections, No. 3, under the act of August 5, 1892 on the 6th day of April, 1894, for the lands above described, together with other lands, which were then unsurveyed. On the 11th day of April, 1899, at the hour of 9 o'clock A. M. the plat of that portion of said township embracing the lands above described was filed in this office and, on said day, said railway company filed its list No. 34 adjusting said selections to the public survey as shown by said plat. On the 17th day of April, 1899, Melvin J. Carter, above named filed homestead application for the lands above described, and, in connection with said application, made affidavit wherein he alleged settlement thereon

the 1st day of December, 1893, and claiming continuous residence and improvement of said lands since date of settlement. A hearing was had in this office on the first day of June, 1903, and, thereafter, a decision was rendered in favor of the homestead claimant, Melvin J. Carter, and the same, together with the files of said case, were transmitted to the Honorable Commissioner of the General Land Office.

By letter "F", of March 23, 1904, the Honorable Commissioner of the General Land Office, remanded said cause to this office for a rehearing for the purpose of determining the question as to the specific tracts on which the improvements claimed by said homestead applicant are situated.

37 "In view of the uncertainty upon this point, a further hearing is ordered, with notice to both parties, that it may be clearly shown on what quarter section the improvements are situated.

"You will confine the hearing strictly to this one matter as I concur in your finding that Carter has shown compliance with the law and is entitled to make entry of the tract on which he was actually living."

Pursuant to said instructions, on the 13th day of August, 1904, a further hearing was duly ordered, and notice thereof was issued to the parties above named, and said cause was set for hearing on the 19th day of October, 1904, at the hour of ten o'clock A. M. On said 19th day of October, 1904, at the hour of ten o'clock A. M., the said Melvin J. Carter appeared by his attorney, Joseph W. Gregory, and said railway company appearing by its attorney Thomas R. Benton; that it was thereupon stipulated and agreed that the hearing of the above entitled cause be continued from the date last above named to the 16th day of October, 1904, at the hour of ten o'clock A. M.; thereafter, on said last named date, at the hour mentioned, the said Melvin J. Carter appeared in person and by his attorney Joseph W. Gregory, together with witnesses, the said railway company appeared by its attorney Thomas R. Benton and witnesses, and thereupon a general appearance was entered for and in behalf of both parties and a hearing was had as shown by the record of Miss Etta Blowers, stenographer of this office, and the same is now on file with the record in this case.

It is shown by the evidence in this case that said St. Paul, Minneapolis and Manitoba railway Company, for the purpose of definitely locating the improvements claimed by said Melvin J. Carter, employed one Henry Gay, who was shown to be an experienced and competent surveyor, who on the 21st day of July, 1904, made a survey of the premises and lands above described, and that by such survey he found the improvements of the said Melvin J. Carter to be located on Lot 2, of Sec. 2, T. 27 N. R. 10 E. W. M., which said Lot 2 is located in and forms a part of the N. W. ¼ of said

38 sec. 2, above described; that, in connection with said survey, he prepared a plat showing parts of sections 1 and 2, of said T. 27, N. R. 10 E., containing the lands in question, together with other lands, upon which said plat is shown and marked the improve-

ments of said M. J. Carter, as same were located by said survey and after having considered all the evidence submitted at said supplemental hearing, we are fully satsfied and find that the mprovements of said Melvin J. Carter made in connection with the said homestead were and are located on said Lot 2, being a portion of the N. W. ¼ of Sec. 2, T. 27 N. R. 10 E. and upon that portion of said township designated and shown by the plat made by said Henry Gay, and introduced and filed as evidence in this case.

Dated: Jan. 21, 1905.

J. HENRY SMITH, *Register.*
LYMAN B. ANDREWS, *Receiver.*

39 Copy.

15—14072.

"F." DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 30, 1905.

Register and Receiver, Seattle, Washington.

SIRS: I am in receipt of your letter of February 13, 1905, transmitting the record of further hearing directed by letter of this office of March 23, 1904, in the case of Melvin J. Carter vs. St. Paul, Minneapolis and Manitoba Railway Company, involving the N. E. ¼, Sec. 2, T. 27, R. 10 E.

The Whole of said section 2 was selected by the railway company April 6th, 1894, while the land was still unsurveyed, under the act of August 5, 1892.

On April 11, 1899, the plat of survey became filed in your office and on same day the company filed it a list N. 34 adjusting its selection to the public surveys.

On April 17, 1899, Melvin J. Carter, filed his homestead application for the said N. E. ¼ alleging settlement thereon December 1, 1893, and continuous residence since, with improvements valued at $500.00.

The fact of settlement and residence is clearly established, as was determined in letter of March 23, 1904, supra; but the location of the improvements and their relation to the lands applied for were not satisfactorily shown, the company alleging that the settlement of Carter was not upon the N. E. ¼.

For the purpose of determining this, the further hearing was ordered.

40 The testimony on this point now before me satisfactorily shows, and you so find, that the house and clearing of Carter are on lot 2 of the section, being part of the N. W. ¼ of N. W. ¼.

This fact being established, it becomes necessary to inquire and determine what rights, legal, or equitable, Mr. Carter may have to the N. E. ¼ by reason of such settlement.

It appears that two parties made settlement on what is now lot 2, one Billy Doolin, and, a short distance below him, Mr. Moe, the land being then unsurveyed; that Melvin J. Carter and his father, E. B.

Carter, went upon the land September 19, 1893, Melvin buying the cabin and improvements of Doolin, and E. B. Carter, the like improvements of Moe, and that each built for himself and family new cabins on their claims, lived there and cultivated small tracts of the land, Melvin claiming what he supposed to be the N. E. ¼ of the section; that about a year after settlement he, with the assistance of his father, constructed trails across the section and up Trout Creek for the purpose of getting to different places on the claim; that he built a barn and stable, which is also used for storing supplies, etc., that he also posted near the north line a homestead notice.

All these things, the notice, trails and barn are shown since the survey to be on the N. E. ¼, but the house and cultivated ground are on the N. W. ¼ about a quarter of a mile west of the quarter section line, between the northeast and the northwest quarters.

It is advanced in argument by the company that these improvements on the N. E. ¼ were made after its selection; but that is not material since they were made in furtherance and continuance of a settlement made prior to such selection and with relation thereto.

41 As an earnest of his belief it may be observed, as shown by the records, that upon survey his father, E. B. Carter, appropriated as the land he claimed, the lot 2 (on which both are living), the S. W. ¼ N. W. ¼ and the N. ½ S. W. ¼ of the section, made homestead entry and final proof thereof and has received his patent therefor without protest from his son; further, the railway company had selected the whole section, yet Melvin Carter made no protest against its claim to the N. W. ¼, but allowed it to obtain patent for Lot 1, or fractional N. E. ¼ N. W. ¼ and the S. E. ¼ N. W. ¼, which lot 1 immediately adjoins on the east Carter's Home.

E. B. Carter evidently claimed south from his home, while Melvin J. Carter was claiming east from his, neither supposing he was interferring with the other, Melvin believing he was over on the N. E. ¼.

I, therefore, have no doubt of the good faith of Carter in his present application, and he now offers to amend his application so as to include the land which the Government finally determines his improvements are placed upon, and to drop from either the eastern of the southern boundary of his claim sufficient land to enable him to include the actual tracts upon which his improvements are located; provided, the Department finally holds that his homestead improvements are not upon the N. E. ¼.

The patenting of Lot 2 to E. B. Carter and Lot 1 which lies between him and the N. E. ¼, to the railway company, place them beyond the jurisdiction of this office, and the suggested adjustment can not be had, and the only relief that can be extended to him is to award to him the N. E. ¼, upon the principal of constructive residence, which, I think, may in all equity and justice be applied in his case; he made some improvements on the N. E. ¼, believed he was residing on that quarter and lived there six years in that belief, and made application for that tract, so believing; therefore under the de-

cisions of the Department in Kendrick v. Doyle, 12 L. D., 67,
42 Noe v. Tipton, 14 L. D. 447; Staples v. Richardson, 16 L. D. 248, and others, I rule that Carter's residence in good faith in a house believed to be upon the land, covered by his application is a constructive residence on such land, and that since said residence antedates the selection of the railroad company he has the better right thereto.

I therefore hold the company's selection of the said N. E. ¼ for rejection, subject to appeal, with a view to permitting Melvin J. Carter to perfect homestead entry thereof, should this decision become final.

Notify the parties thereof; Mr. Carter will also be informed by this office through his resident attorneys, Messrs. Holcomb and Keegin.

Very respectfully, J. H. FRIMPLE,
Acting Commissioner.

J. D. P.

43 Copy.

34—472.

E. J. H.
F. W. C.
S. V. P.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 23, 1905.

ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY CO.
v.
MELVIN J. CARTER.

The Commissioner of the General Land Office.

SIR: April 6, 1894, the St. Paul, Minneapolis and Manitoba Railway Company, prior to survey, made selection of all of Sec. 2, T. 27 N. R. 10 E., Seattle, Washington, land district, under the act of August 5, 1892, per list No. 3.

April 11, 1899, the plat of survey was filed in the local office and on the same day said railway company filed its list No. 34, adjusting its selection to the lines of the survey.

April 17, 1899, Melvin J. Carter tendered his homestead application for the N. E. ¼ of said section alleging settlement thereon December 1, 1893, with continuous residence thereon, ever since and that his improvements were of the value of $500.

A hearing was ordered in the case which, after several continuances, was held June 1, 1903. As a result thereof the local officers found that Carter was a settler on said northeast quarter in controversy prior to the railway company's selection thereof, that the homestead law had been complied with by him in the matter of residence and improvements and it was recommended that his application be allowed and the company's application to select be rejected.

The railway company appealed, claiming error in said rul-
44 ing and also alleging that the local officers should have found that Carter's house and improvements were not situated on the land applied for by him but more than three-eight-s of a mile therefrom.

March 23, 1904, your office decision concurred in the finding of the local officers in the matter of Carter's residence and improvements; that the fact that he registered and voted in the city of Seattle in 1896 and again in 1898, while his family were residing on the land, tended to show an illegal act in thus voting rather than a change of domicile.

In the matter of the railway company's claim that Carter's house and improvements were located upon other land than that applied for it was found that the testimony tendered to show that they were not located on the land in controversy, but as the question was involved in some doubt a new hearing was ordered, the same to be confirmed to that one point.

This hearing was held November 16, 1904, upon the conclusion of which the local officers found that Carter's house and clearing were not upon the land applied for by him but upon lot 2 of said section, it being a part of the N. W. ¼ of N. W. ¼ thereof. From this finding Carter appealed.

June 30, 1905, your office decision found that the fact of settlement and residence was clearly established as was determined in your office decision of March 23, 1904; that from the testimony adduced at the second hearing it was satisfactorily shown that the house and clearing of Carter were on lot 2 of said section, as found by the local officers, and in view thereof it was necessary to determine what rights Carter had to the N. E. ¼ by reason of such settlement.

It appeared from the testimony that originally two parties, prior to survey, made settlement upon what is now lot 2; one Doolin, near the Northeast corner of said tract, and one Moe, some dis-
45 tance south and west of Doolin; that about September 19, 1893, the homestead claimant, Melvin J. Carter, purchased the cabin and improvements of Doolin, and his father, E. B. Carter, the like improvements of Moe, and that each built a new house on his claim and lived therein, clearing and cultivating small tracts of land, Melvin claiming what he supposed to be N. E. ¼ of the section, and his father, land to the south and west of him; that they together constructed trails across the section and up Trout Creek to the north and east for the purpose of getting to different places on their claims; that Melvin also built, some considerable distance from his house, a barn, which was used to store supplies in, and near the same posted a notice of his claim.

It also appeared that the notice, trails and barn were shown, upon survey, to be on the N. E. ¼, but the house and clearing upon the N. W. ¼ over a quarter of a mile to the west of said barn; that as shown by the records, E. B. Carter, the father, appropriated lot 2, on which both were living, the S. W. ¼ of the N. W. ¼ and N. ½ of S. W. ¼ of the section, made his final proof and has received his

patent therefor without protest from his son Melvin; that the latter made no protest against the railway Company's selection of any part of the N. W. ¼ but allowed it to obtain patent to lot 1, being fractional N. E. ¼ of N. W. ¼, which is situated between his house and the barn, trails etc., together with the S. E. ¼ of N. W. ¼. Said decision found that the applicant, Melvin J. Carter, made the settlement in question in good faith, established residence and resided there nearly six years prior to survey supposing that he was residing on the N. E. ¼ and upon survey made application for that tract. In view thereof and of the fact that he had made improvements thereon it was held that he had a constructive residence upon said N. E. ¼. The railway company's selection of said tract was held for rejection with a view to allowing Carter to perfect homestead entry thereof, from which the company has appealed to the Department.

46 An examination of the testimony shows the facts to be substantially as set forth in your office decision, and shows that while Carter was away much of the time, working to earn money for the support of himself and family, he had no other home and his family steadily resided in the house he built, except during the winter seasons when they were obliged on account of deep snows and high water from the river, situated near by, to go elsewhere temporarily; that his wife helped clear land, set out trees and shrubbery and raised vegetables from year to year. His residence and improvements seem to have been ample. The fact that while his family were thus residing on the land, he, on two occasions, registered and voted in Seattle, is a circumstance to be counted against his claim of a bona fide residence, but in view of the showing is not sufficient to overcome the otherwise very satisfactory showing of an actual residence.

It is evidence from the testimony and circumstances in the case that when Melvin J. Carter purchased the cabin and improvements of Doolin, and built the new house into which he moved with his family, the land being then unsurveyed, he intended to claim land extending to the east of said improvements. This is shown from the fact he built the barn, made the trails and posted notice of his claim over a quarter of a mile to the east, as shown in the case. It does not appear why he did not apply for lot 1, or fractional N. E. ¼ of N. W. ¼, situated between his house and the land applied for. It does appear, however, that several surveys of the land, either public or private, had been made, and that the situation was confusing as to lines and stakes even to those accustomed to looking up lines and corners. As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the N. E. ¼.

As he is shown to have been a bona fide homestead settler upon unsurveyed land at the time the railway company made selec-

47 tion thereof, and subsequently has made a good compliance with the law as to residence and improvements, the Department is of the opinion that his application for the tract in question should be allowed. As the railway company made selection of the

entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the N. E. ¼ to made 160 acres.

Your office decision holding in favor of Carter is affirmed and upon his perfecting his application for said N. E. ¼ of Sec. 2, T. 27, N. R. 10 E., the railway Company's selection thereof will be cancelled.

The papers are herewith returned.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

Filed Jun- 24, 1911.
W. F. MARTIN,
County Clerk.

48 In the Superior Court of the State of Washington in and for the County of Snohomish.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a Corporation, Defendants.

Certificate of Transcript.

I, W. F. Martin, Clerk of the Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the Respondent to transmit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court this 23 day of December, 1911.

W. F. MARTIN, *Clerk,*

[SEAL.] By CHAS. H. FICKEL,
Deputy Clerk.

49 Filed July 20, 9:20, 1912.

Department One.

No. 10018.

GREAT NORTHERN RAILWAY COMPANY, Appellant,

v.

JAMES A. HOWER et al., Respondents.

Action by Great Northern Railway Company, a corporation, against James A. Hower and others, to quiet title to land. Defendants' demurrer was sustained to the amended complaint. Thereupon plaintiff declined to plead further and appealed from an order of dismissal.

The amended complaint is too voluminous to be here set forth. The appellant railway company, as successor of St. Paul, Minneapolis & Manitoba Railway Company, a corporation, claims the land under act of Congress of August 5, 1892; 27 Stats. at Large, p. 390, Chap. 382. The amended complaint alleges that on October 20, 1892, the St. Paul, Minneapolis & Manitoba Railway Company released certain lands in North Dakota; that on March 24, 1894, it selected in lieu thereof under said act of congress a certain tract of unsurveyed land in King county, Washington, which when surveyed was found to be the northeast quarter of section 2, township 27, north of range 10 east of the Willamette Meridian; that it filed in the United States land office at Seattle a list describing the land with reasonable certainty; that the land so selected was not reserved; that no adverse claim had attached or been initiated thereto; that it was thereafter surveyed, the plat of survey being filed in the United States land office at Seattle on April 11, 1899; that when the plat was filed the selected land was found to be the northeast quarter of section 2, township 27, north of range 10 east, W. M., and that on April 11, 1899, appellant's grantor filed a supplemental selection which re-described the land so as to make the same conform to the lines and subdivisions of the government survey. The amended complaint further states that, on or about April 18, 1899, one Melvin J. Carter, respondents' grantor, filed in the United States
50 land office at Seattle his written application to enter the same quarter section under the homestead laws, claiming he had settled on the land on December 1, 1893; that after various hearings and appeals, the land was awarded and patented to Carter by the decision of the secretary of the interior; that the land officers committed error of law in awarding the land to Carter, as he had made no actual settlement in compliance with the homestead laws. Prior to the hearing of the demurrer the following written stipulation was filed:

"In passing upon the demurrer to the amended complaint, it is stipulated that the court may consider the decisions of the Land Department, referred to in the amended complaint, namely

The decision of the register and receiver of August 28, 1903.

The decision of the acting assistant commissioner of March 23, 1904.

The decision of the register and receiver of January 21, 1905.

The decision of the acting commissioner of June 30, 1905.

The decision of the secretary of the interior of November 23, 1905, and that the annexed are true copies of said decisions."

Copies of these decisions are attached to the stipulation. From the allegations of the amended complaint and these decisions it appears that the following facts relative to Carter's settlement, improvements and claim were found by the land department officials; that Carter's house was located on lot 2, a portion of the northwest quarter of the section; that prior to 1893 one Doolin made settlement on what is now known as lot 2; that a short distance below him one Moe also made a settlement; that Melvin J. Carter and his father E. B. Carter went upon the land on September 19, 1893, Melvin J. Carter buying

Doolin's cabin and E. B. Carter buying Moe's cabin; that each built a new cabin; that Melvin J. Carter claimed what he supposed was the northeast quarter of the section; that about a year later with the assistance of his father he constructed a trail across the section and up Trout creek on the northeast quarter, for the purpose of reaching different places on the claim; that he built a barn and stable which he used for storing supplies; that he posted on the north section line a homestead notice; that the trail, barn and notice, since the survey, are shown to have been on the northeast quarter, but that his house and most of the cultivated ground are on lot 2 in the northwest quarter, the house being about one quarter of a mile west of the quarter section line; that lot 2 on which both
51 Carters were living has been patented to the father E. B. Carter without protest from Melvin J. Carter; that lot 1 lies between lot 2 and the northeast quarter, east of the former and west of the latter; that the railway company had selected the entire section; That Mlvin J. Carter made no protest against the company's claim to the northwest quarter, but allowed it to obtain a patent for lot 1 thereof; that neither Melvin J. Carter nor his father thought they were interfering one with the other; that Melvin J. Carter was claiming to the east from his house, while his father was claiming to the south from him; that Melvin had acted in good faith; that he offered to amend his application so as to include the land upon which the government should finally determine his improvements were actually located, and drop from either the eastern or southerly boundary of his claim sufficient land to enable him to include the tracts upon which his improvements were made; that this could not be done as a patent had been issued to the railway company for lot 1; that the northeast quarter should be patented to Melvin J. Carter, and that the railway company having selected the entire section would lose no more land than it would have lost had Carter applied for lot 1 with a sufficient portion of the northeast quarter to make one hundred and sixty acres. In the opinion of the secretary of the interior, addressed to the commissioner of the general land office, he said:

"As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the northeast quarter. As he is shown to have been a bona fide homestead settler upon unsurveyed land at the time the railway company made selection thereof, and subsequently has made a good compliance with the law as to residence and improvements, the department is of opinion that his application for the tract in question should be allowed. As the railway company made selection of the entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the northeast quarter to make 160 acres. Your office decision holding in favor of Carter is affirmed and upon his perfecting his application for said northeast quarter of Sec. 2, T. 27 N., R. 10 E., the railway company's selection thereof will be cancelled."

The theory upon which the patent was awarded to Melvin J.

Carter was that he had acted in good faith; that his settlement was prior in date to the selection made by the railway company; that the land was then unsurveyed, and that constructively his
52 improvements and settlement were made on the northeast quarter.

Appellant concedes that the facts found by officers of the land department bearing upon the good faith of Melvin J. Carter cannot be reviewed in this action, but insists that their conclusions of law if erroneous may and should be here corrected. The doctrine is well established that the decisions of officials of the land department upon questions of fact, although reviewable upon appeals within the department itself, are conclusive on all courts of justice in the absence of fraud or mistake, but that courts of equity have jurisdiction to correct mistakes, to relieve against fraud, or to afford a remedy when it becomes apparent that the officials of the land department have by erroneous conclusions of law given to one claimant public land which upon the undisputed facts should have been patented to another.

Shepley v. Cowan, 91 U. S. 330;
Moore v. Robbins, 96 U. S. 530;
Quinby v. Conlan, 104 U. S. 420;
Baldwin v. Stark, 107 U. S. 463;
Gonzales v. French, 164 U. S. 338;
Wiseman v. Eastman, 21 Wash. 163;
Gray's Harbor Co. v. Drumm, 23 Wash. 706.

There is no contention that fraud or mistake has been pleaded in this action. The officers of the land department found that Melvin J. Carter was residing on the land before the railway company made its selection; that although his dwelling house was on an adjoining tract, his notice was posted on the northeast quarter; that a portion of his improvements were thereon; that he acted in good faith, and that the railway company has sustained no actual loss other than it would sustain had the land upon which his improvements were actually located been awarded him. These findings are not and cannot be questioned. The United States land department has repeatedly held that a settler constructively residing upon lands claimed by him should be permitted to acquire the title.

53 Falkington's Heirs v. Hempfling, 2 L. D. 46;
Lewis C. Huling, 10 L. D. 83;
Kendrick v. Doyle, 12 L. D. 67;
Staples v. Richardson, 16 L. D. 248.

Appellant, citing numerous land office decisions, concedes that the residence of a homestead and preemption claimant, not upon his claim, has been frequently held a sufficient compliance with the law, but insists that such decisions are not controlling here, as in each of them the residence involved was only a short distance beyond the line, was moved upon the land as soon as the mistake was discovered, and that in nearly all if not all such cases, there were other substantial improvements on the land claimed. Appellant calls atten-

tion to the fact that in this case Carter's dwelling house was a quarter of a mile distant from the land claimed, and argues that no case heretofore decided has held such a remote residence to have been a sufficient compliance with the requirements of the homestead act. In most of the cases which appellant has cited the land had been surveyed before the settlement or improvements were made. Not only was this land unsurveyed, but the facts found and pleaded show that in places it was rough, uneven and difficult of access. In Keogle v. Griffith, 13 L. D. 7, one of the cases cited by appellant, it affirmatively appeared that the claimant's improvements were about forty rods from the land entered, yet a patent was awarded. Upon the facts before us we conclude the decisions of the land department are controlling.

"The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon."
Ard v. Brandon, 156 U. S. 537, 543.

The land was rightfully awarded and patented to respondents' assignor Melvin J. Carter. The amended complaint does not state a cause of action. The judgment is affirmed.

CROW, *J.*

We concur:
PARKER, *J.*
CHADWICK, *J.*
GOSE, *J.*

54 In the Supreme Court of the State of Washington.

TUESDAY, *August* 20, 1912.

No. 10018.

GREAT NORTHERN RAILWAY COMPANY, Appellant,
vs.
JAMES A. HOWER et al., Respondents.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the superior court of Snohomish County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 20th day of August, A. D. 1912, on motion of J. A. Coleman, Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said superior court be, and the same is, hereby affirmed with costs, and that the said James A. Hower et al., have and recover of and from the said Great Northern Railway Company and from the National Surety Company, surety, the cost of this action taxed and allowed at Forty-eight &

00/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said superior court for further proceedings, in accordance herewith.

55 In the Supreme Court of the State of Washington.

No. 10018.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

JAMES A. HOWER, Individually and as Trustee; ANNA H. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a Corporation, Respondents.

Petition for Writ of Error.

To the Honorable Judges of the Supreme Court of the State of Washington:

Your petitioner, the above named Great Northern Railway Company, respectfully shows that on the 20th day of June, 1912, the Supreme Court of the State of Washington rendered a final judgment against your petitioner in a certain case, wherein your petitioner was plaintiff and James A. Hower, individually and as trustee; Anna H. Hower, wife of said James A. Hower; Nonpareil Consolidated Copper Company, a corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a corporation, were defendants, as will appear by reference to the record and proceedings in said case, and that the said court is the highest court of said state in which a decision in said suit could be had; that this is an action brought under the statutes of the United States relating to the public lands of the United States and the control of the same by the Department of the Interior and the sale and patenting of the same to citizens of the United States, and under and by virtue of the said statutes, the said Great Northern Railway Company
56 claims title to and the right to a patent for certain public lands in the state of Washington, and that by this suit there was drawn in question the construction of certain of said statutes, and the decision of this court is against said title and right claimed by the said Great Northern Railway Company, and as it believes, contrary to the statutes of the United States relating to the sale and disposition of its public lands and against the right and title of the said Great Northern Railway Company thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, the said Great Northern Railway Company prays that a writ of error may issue to the Supreme Court of the State of Washington for the correcting of the errors complained of and that a

duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

GREAT NORTHERN RAILWAY COMPANY.
F. V. BROWN,
F. G. DORETY,
Attorneys for Petitioner.

Endorsed: No. 10018. Great Northern Ry. Co., a corporation, Appellant, v. James A. Hower et al., Respondents. Petition for Writ of Error. Filed Nov. 8, 1912. C. S. Reinhart, Clerk.

57 In the Supreme Court of the State of Washington.

10018.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,
vs.
JAMES A. HOWER, Individually and as Trustee; ANNA H. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a Corporation, Respondents.

Order Allowing Writ of Error.

Comes now, the Great Northern Railway Company, the appellant above named, on this 8th day of November, 1912, and presents to this court, its petition, praying for the allowance of a writ of error intended to be urged by it; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the said premises as may be just and proper; and upon consideration of the said petition this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed as prayed, provided, however, that the said Great Northern Railway Company give bond according to law, in the sum of One thousand ($1,000.00) Dollars, which said bond shall operate as a supersedeas bond.

In Testimony Whereof, witness my hand this 8th day of November, A. D. 1912.

WALLACE MOUNT,
Chief Justice of the Supreme Court of the State of Washington.

Endorsed: No. 10018. Great Northern Railway Company, a corporation, appellant, v. James A. Hower et al., Respondents. Order allowing writ of Error. Filed Nov. 8, 1912. C. S. Reinhart, Clerk.

58 In the Supreme Court of the State of Washington.

No. 10018.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff and Appellant,

vs.

JAMES A. HOWER, Individually and as Trustee; ANNA H. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a Corporation, Defendants and Respondents.

Assignments of Error.

Now comes the said Great Northern Railway Company, plaintiff in the above entitled cause, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Washington, in the above entitled matter, there is manifest error in this, to-wit:

1. That the said Supreme Court in and by said judgment held that the homestead right of Melvin J. Carter had attached, or been initiated, to the land in controversy in said action prior to the selection of the said land by the said plaintiff under the Act of Congress approved August 5, 1892.

2. That the said Supreme Court in and by said judgment held that the residence of the said Melvin J. Carter as alleged and described in the amended complaint in said action was a residence upon the Northeast quarter (N. E. ¼) of Section Two (2), Township Twenty-seven (27) North, Range Ten (10) East, Willamette Meridian, within the requirements of the homestead laws of the United States and in refusing to hold that the said residence was as a matter of law not a sufficient compliance with the said homestead laws.

59 3. That the said Supreme Court in and by said judgment held that the said defendants showed a prior right to the land in controversy in said action in the said respondents and in failing to hold that the said respondents hold the legal title to said land and premises in trust for plaintiff and appellant, and to adjudge and decree that the said defendants execute and deliver to plaintiff a deed conveying said land and premises to plaintiff.

GREAT NORTHERN RAILWAY COMPANY,
By F. V. BROWN,
F. G. DORETY,
Its Attorneys.

Dated this 6 day of November, 1912.

Endorsed: No. 10018. Great Northern Ry. Co., a corporation, Appellant, v. James A. Hower et al., Respondents. Assignments of Error. Filed Nov. 8, 1912. C. S. Reinhart, Clerk.

60 No. 10018.

Know all men by these presents, that Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto James A. Hower, individually and as trustee; Anna H. Hower, wife of said James A. Hower; Nonpareil Consolidated Copper Company, a corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a corporation, in the sum of one thousand dollars ($1,000.00), to be paid to the said obligees, their heirs, representatives, successors and assigns, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 6th day of November, A. D. 1912.

Whereas, lately, in the Supreme Court of the State of Washington, in a suit pending in said court between Great Northern Railway Company, Plaintiff, and James A. Hower, individually and as trustee; Anna H. Hower, wife of said James A. Hower; Nonpareil Consolidated Copper Company, a corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a corporation, Defendants, judgment was entered against said plaintiff and said plaintiff hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now Therefore, the condition of this obligation is such that if the above named plaintiff, Great Northern Railway Company shall prosecute its said writ of error to effect and answer all costs
61 and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY.
By F. G. DORETY,
Its Attorney.

[SEAL.] NATIONAL SURETY COMPANY.
By GEO. W. ALLEN,
Its Attorney in Fact.

Approved Nov. 8th, 1912.

WALLACE MOUNT,
Chief Justice Supreme Court, Washington.

Endorsed: No. 10018. Great Northern Ry. Co., a corporation, Appellant, v. James A. Hower et al., Respondents. Bond on Writ of Error. Filed Nov. 8, 1912. C. S. Reinhart, Clerk.

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Great Northern Railway Company, a corporation, plaintiff and appellant, and James A. Hower, individually and as trustee; Anna H. Hower, wife of said James A. Hower; Nonpareil Consolidated Copper Company, a corporation; Nicholas H. Rudebeck and James McCreery Realty Company, a corporation, defendants and respondents, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title or privilege specially set up or claimed by said plaintiff under said statute, a manifest error *have* happened to the great damage of the said Great Northern Railway Company as by its complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty (60) days from the date hereof, that the record and
63 proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 11th day of November in the year of our Lord one thousand nine hundred and twelve.

[Seal of the United States District Court, Western District of Washington.]

FRANK S. CROSBY,
Clerk of the District Court of the United States.

The above writ of error is hereby allowed.

WALLACE MOUNT,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

63½ We hereby acknowledge service of the foregoing Writ of Error and the receipt of a true copy thereof, this 13th day of November, 1912.

J. A. COLEMAN,
Attorneys for Respondents.

[Endorsed:] No. 10018. In the Supreme Court of the State of Washington, —— County. Great Northern Ry. Co., a corporation, Appellant, v. James A. Hower, et al., Respondents. Writ of Error. Filed Nov. 18, 1912. C. S. Reinhart, clerk. F. V. Brown, attorney for Appellant, 302 King Street Passenger Station, Seattle, Washington.

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to James A. Hower, individually and as trustee; Anna H. Hower, wife of said James A. Hower; Nonpareil Consolidated Copper Company, a corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Washington, wherein Great Northern Railway Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Wallace Mount, Chief Justice of the Supreme Court of the State of Washington, this 8th day of November, 1912.

WALLACE MOUNT,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

64½ *We* hereby acknowledge service of the foregoing Citation and the receipt of a true copy thereof, this 13th day of November 1912.

J. A. COLEMAN,
Attorneys for Respondents.

[Endorsed:] No. 10018. In the Supreme Court of the State of Washington, — County. Great Northern Ry. Co., a corporation, Appellant v. James A. Hower, et al., Respondents. Citation. Filed Nov. 18, 1912. C. S. Reinhart, clerk. F. V. Brown, Attorney for Appellant, 302 King Street Passenger Station, Seattle, Washington.

65 In the Supreme Court of the State of Washington.

#10018.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant,
v.
JAMES A. HOWER, Individually and as Trustee; ANNA H. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Respondents.

Certificate.

I, C. S. Reinhart, clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause. That in pursuance of the Writ of Error heretofore filed in this cause I now transmit the same together with the original Writ of Error and the Original Citation to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 19th day of December, 1912.

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 23,479. Washington Supreme Court. Term No. 411. Great Northern Railway Company, plaintiff in error, vs. James A. Hower, individually and as trustee; Anna H. Hower, wife of James A. Hower; Nonpareil Consolidated Copper Company et al. Filed December 31, 1912. File No. 23,479.

(23,479)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 411.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES A. HOWER, INDIVIDUALLY AND AS TRUSTEE; ANNA H. HOWER, WIFE OF JAMES A. HOWER; NONPAREIL CONSOLIDATED COPPER COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1914.

1 10018.

Filed Nov. 23, 1911. C. S. Reinhart, Clerk. F.

In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Index to Transcript on Appeal to Supreme Court.

F. V. Brown & F. G. Dorety, King Street Passenger Station, Seattle, Wash., Attorney for Appellants.

J. A. Coleman, American National Bank Building Everett, Wash., Attorney for Respondents.

Filed Oct. 7, 1911.

W. F. MARTIN,
County Clerk.

2 In the Superior Court of the State of Washington in and for the County of Snohomish.

No. 9033.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

v.

JAMES A. HOWER, Individually and as Trustee; ANNA A. HOWER, Wife of said James A. Hower; Nonpareil Consolidated Copper Company, a Corporation; Nicholas H. Rudebeck, and James McCreery Realty Company, a Corporation, Defendants.

Amended Complaint.

Comes now the plaintiff, and with leave of court first had and obtained, files herein its amended complaint, and alleges:

I.

That it is a railway corporation organized and existing under the laws of the state of Minnesota and authorized by the laws of the state of Washington to do business and own real property in said state, and has paid its license fee to the State of Washington last due.

II.

That the defendant Nonpareil Consolidated Copper Company is a corporation organized and existing under the laws of the State of Washington.

III.

That said defendants James A. Hower and Anna A. Hower at all the times herein mentioned were, and now are, husband and wife.

IV.

That the defendant, the James McCreery Realty Company, a corporation, is a corporation duly organized and existing under
3 — by virtue of the laws of the State of New York.

V.

That by Section One of an Act of Congress of the United States entitled "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," approved August 5, 1892, The St. Paul, Minneapolis and Manitoba Railway Company, a corporation organized and existing under the laws of the State of Minnesota, was authorized to release and relinquish to the United States certain lands within the limits of its grant in the States of North Dakota and South Dakota, and the right and authority was in and by said Act granted to said railway company to select, in

lieu of any lands relinquished under said Act, an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has or shall be made, of the United States, not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railway owned by said company runs, to the extent of the lands so relinquished and released. And it was provided that the tracts of land so by said company to be selected in one body should not exceed six hundred and forty acres.

And it was provided in and by Section Three of said Act, that upon the filing by said railway company at the local land office of the land district in which any tract of land selected in pursuance of the said act shall lie, a list describing the tract or tracts selected, and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, the said Secretary shall cause to be executed in due form of law and delivered to said Company a patent of the United States conveying to it the lands so selected. And it was further provided that in case the tracts of land so selected shall at the time of the selection be unsurveyed, the
4 list filed by the company at the local land office shall describe such tracts in such manner as to designate the same with a reasonable degree of certainty, and that within three months after the lands included in the tract so selected shall have been surveyed and the plats thereof filed in the local land office, a new selection list shall be filed by said company describing such tract according to such survey, and that in case such tract, as originally selected and described, shall not precisely conform with the lines of the original survey, the said company shall be permitted to describe such tract anew so as to produce such conformity.

And it was provided in and by Section Four of said Act that said Act should take effect and be in force from the time of its acceptance by the said Railway Company, which must be within ninety days from the approval of said Act.

VI.

That thereafter and within ninety days from and after the approval of said act the St. Paul, Minneapolis and Manitoba Railway Company duly accepted said Act and filed such acceptance in the office of the Secretary of the Interior.

VII.

That thereafter, and on the 20th day of October, 1892, the said railway company, upon written request by the Secretary of the Interior, duly released, relinquished and conveyed to the United States, under and pursuant to the provisions of Section one of said Act, 44,745.31 acres of lands within the odd-numbered sections within the limits of its grant in the State of North Dakota, and said release and relinquishment was thereafter, and on the 8th day of December, 1892, duly accepted by the Secretary of the Interior.

That said release and relinquishment included, among other lands, the N. E. ¼ of Section 9, Township 130 North, of Range 47 West of the Fifth Principal Meridian, in the State of North Dakota.

5 VIII.

That at the time of the passage of said act the Railway owned by said company had been constructed and extended and ran into or through the states of Minnesota, North Dakota, South Dakota, Montana, Idaho and Washington.

IX.

That thereafter, and on the 24th day of March, 1894, the said The St. Paul, Minneapolis and Manitoba Railway Company duly selected under the said act a certain tract of unsurveyed land, which on survey was found to be the N. E. ¼ of Section 2, Township 27 North, Range 10 East of the Willamette Meridian, lying in the Seattle Land District, in the County of Snohomish, in the State of Washington, in lieu of said N. E. ¼ of Section 9, Township 130 North, Range 47 West of the Fifth Principal Meridian, State of North Dakota, which it had theretofore released and relinquished to the United States as hereinbefore stated, and, on said 24th day of March, 1894, filed in the District Land Office at Seattle, Washington, a list describing the land, so selected with a reasonable degree of certainty: that the land so selected was described in such manner so that the same could be located with certainty. That on said date the said railway company paid to the Receiver of said land office the legal fees for such selection, and thereafter, and on or about the 6th day of April, 1894, the Register and Receiver accepted and approved said list and noted the selection on their records and the said selection list was thereafter transmitted by the district land officers to the General Land Office and noted on the records of said office. That the land so selected was not reserved and no adverse right or claim had attached or been initiated thereto at the time of making such selection, and did not exceed six hundred and forty acres in one body.

6 X.

That the said land was thereafter duly surveyed by the United States and the plat of the survey thereof was filed in the district land office at Seattle, Washington, on the 11th, day of April, 1899. That said land was non-mineral public land and was so classified as non-mineral at the time of the actual government survey.

XI.

That when the official plat of the survey of said land was filed in the district land office at Seattle, Washington, the land selected by said railway company, as hereinbefore stated, was found to be the N. E. ¼ of Section 2, Township 27 North, Range 10 East of the Willamette Meridian. That said Company thereupon and on said

11th day of April, 1899, filed in said district land office a supplemental selection list which redescribed the land selected so as to make such selection conform to the lines and subdivisions of the government survey.

XII.

That on or about the 18th day of April, 1899, one Melvin J. Carter, filed in said district land office his application to enter said N. E. ¼ of Section 2, Township 27 North, Range 10 East, under the homestead laws of the United States. In his application said Carter alleged and claimed that he settled on said land on the 1st day of December 1893 and had maintained a continuous residence thereon since that time.

XIII.

That thereafter the district land officers duly ordered a hearing between said railway company and said Carter for the purpose of determining whether said Carter had settled upon the land embraced in his homestead application prior to the selection thereof by said Railway Company. That the evidence taken at said hearing
7 showed that said Carter, on September 19, 1893, purchased the improvements of a former settler upon a tract of unsurveyed land on the left bank of the North Fork of the Skykomish River a short distance below the mouth of a tributary of said river known as Trout Creek. That said Carter established a residence in the cabin of the former s-ttler, and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he thereupon moved his family into said dwelling house and had continued to reside in said house and on said land with his family to the time of said hearing; that his improvements consisted of said dwelling house and a small clearing in which he set out trees and shrubbery and raised vegetables from year to year. The evidence taken at said hearing further showed that Carter's said improvements were all situated on the left bank of the North Fork of the Skykomish River, about two or three hundred feet from said river and about one-half a mile below the mouth of said Trout Creek, and not upon the land applied for by said Carter under the homestead law. On said evidence the Register and Receiver, on August 28, 1903, held and decided that said Carter had duly settled upon the land claimed by him during the month of September, 1893, and had continued to reside upon improve and cultivate said land to the time of said hearing on June 1, 1903, and that he should be allowed to enter the land applied for under the homestead law and that the railway company's selection thereof should be canceled.

XIV.

That the St. Paul, Minneapolis and Manitoba Railway Company duly appealed to the Commissioner of the General Land Office from said decision of the Register and Receiver, claiming and alleging among other things that the evidence produced at said hearing conclusively showed that the dwelling house and other improve-

ments of said Carter were not on the land selected by said
8 railway company and applied for by said Carter, but were and at all times had been situated more than three-eight-s of a mile from said land. That the Commissioner of the General Land Office on March 23, 1904, held and decided that said Carter had settled upon the land upon which his improvements were situated in the fall of 1893; that he had commenced his residence thereon with his family in the spring of 1894, and had continued to reside upon and improve same. The Commissioner further held that the evidence taken at said hearing tended to show that said Carter's improvements were all situated on the N. W. ¼ of Section 2, Township 27 North, Range 10 East, and not on the N. E. ¼ of said Section 2. The Commissioner thereupon directed the Register and Receiver of the Seattle Land Office to order a further hearing in said case to the end that it might clearly be shown on what quarter section Carter's improvements were situated and that said hearing should be strictly confined to the question of the location of Carter's improvements.

XV.

That a further hearing in said matter was duly ordered by and held before the Register and Receiver of the Seattle Land Office on the 16th day of December 1904. That the evidence taken at said rehearing conclusively showed that the improvements, including the dwelling house and residence of said Carter, were all situated on Lot 2 of said Section 2, Township 27 North, Range 10 East: that said Lot 2 is located in and is a part of the N. W. ¼ N. W. ¼ of said Section, and that the east line of said Lot is located a quarter of a mile west of the west line of said N. E. ¼ of said Section 2, applied for by Carter. That the evidence taken at said hearing further showed that at some time prior to said hearing said Carter had constructed or taken part in the construction of a trail up Trout Creek and extending over and across a part of said N. E. ¼ of Section 2; that about the year 1899 there had been constructed
on the northwesterly part of said N. E. ¼ of Section 2 a
9 small stable or barn and that said Carter had at times used said stable or barn for storage purposes. That upon the evidence taken at said rehearing the Register and Receiver of said Seattle Land Office on January 21, 1905, held and decided that all of said Carter's improvements were located on said Lot 2 of said Section 2.

XVI.

That thereafter and on the 30th day of June, 1905, the Commissioner of the General Land Office, on the evidence taken at said rehearing, held and decided that on or about September 19, 1893 Melvin J. Carter purchased the claim, cabin and improvements of a former settler; that he built for himself and family a new cabin on the claim purchased; that he lived in said cabin and cultivated a small tract of land on said claim; that about a year after his said settlement *and* Carter constructed trails across said Section 2 and up Trout Creek for the purpose of getting to different

places on his claim; that he also built a barn or stable and used it for storing supplies; that a part of the trails and the stable or barn were on the N. E. ¼ of said Section 2, and that the dwelling house and cultivated land were all on the N. W. ¼ said Section 2 about one-fourth of a mile west of the west line of N. E. ¼ of said section. That notwithstanding that the evidence produced at said rehearing failed to show that said Carter ever resided upon, improved or cultivated any part of the said N. E. ¼ of Section 2, and did conclusively show that said Carter's dwelling house and cultivated land and improvements except only said trails and stables or barn, which were constructed after said railway company's selection of said land, were situated more than one-fourth of a mile from said N. E. ¼, and the commissioner of the General Land Office found such to be facts, said commissioner wrongfuly and unlawfully and in fraud of said railway company's right to said land and to complete its selection thereof and to receive the patent of the United States therefor, further held, as a matter of law, that said Carter's residence was established and maintained in good faith and in the belief that his dwelling house was upon the land embraced in his homestead application and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the N. E. ¼ of said Section 2, was a constructive residence on said N. E. ¼, and that said Carter should be permitted to make homestead entry of said land and that the selection thereof by the St. Paul, Minneapolis and Manitoba Railway Company should be canceled.

XVII.

That the St. Paul, Minneapolis and Manitoba Railway Company thereupon duly appealed to the Secretary of the Interior from the said decision of the Commissioner of the General Land Office alleging and claiming among other things, that said Carter had never resided upon, occupied, cultivated or in any manner improved the land embraced in his homestead application; that his dwelling house and improvements were situated more than a quarter of a mile from said N. E. ¼ and that his acts did not constitute a settlement upon said N. E. ¼ within the meaning of the homestead law. That thereafter, and on the 23rd day of November 1905, the Secretary of the Interior, passing on said appeal, held the facts in said case to be as found by the Commissioner in his said decision, and on said facts, wrongfully and unlawfully and in fraud of the right of said railway company to said land, held and decided as a matter of law that said Carter was shown to have been a bona fide homestead settler upon unsurveyed land at the time the railway company made selection of the N. E. ¼ of said Section 2 and subsequently complied with the law as to residence and improvements, he was constructively a settler upon said N. E. ¼ and that his application to enter said land under the homestead law should be allowed and the selection thereof by said railway company canceled.

11

XVIII.

That said St. Paul, Minneapolis and Manitoba Railway Company's selection of said N. E. ¼ of Section 2 was thereafter, pursuant to the said decision of the Secretary of the Interior, canceled by the Commissioner of the General Land Office. That thereafter, and on the 16th day of March, 1906, said Melvin J. Carter was permitted to make and did make homestead entry of said N. E. ¼ of Section 2; that thereafter, and on or about May 16, 1906, said Carter made the final proofs of settlement and cultivation required by Section 2291, Revised Statutes of the United States, and received final entry certificate for said land; and that thereafter, and on or about the 8th day of March, 1907, patent of the United States was issued to said Carter conveying to him the legal title to said land.

XIX.

That the said decisions of the Commissioner of the General Land Office and the Secretary of the Interior, and the cancellation of said Railway Company's selection, were, and each of them was, wrongfully and erroneously made through a mistake of law, in this, that it was in and by said decisions held that the settlement and residence of said Carter upon a tract of land situated one-fourth of a mile distant from the land sought to be entered by him was constructively, and within the meaning of the homestead law of the United States, a settlement upon the land last mentioned.

XX.

That the land selected by said Railway company and embraced in the homestead application and entry of said Carter is rough and Mountainous, densely and heavily timbered and wholly unfit for agricultural purposes.

12

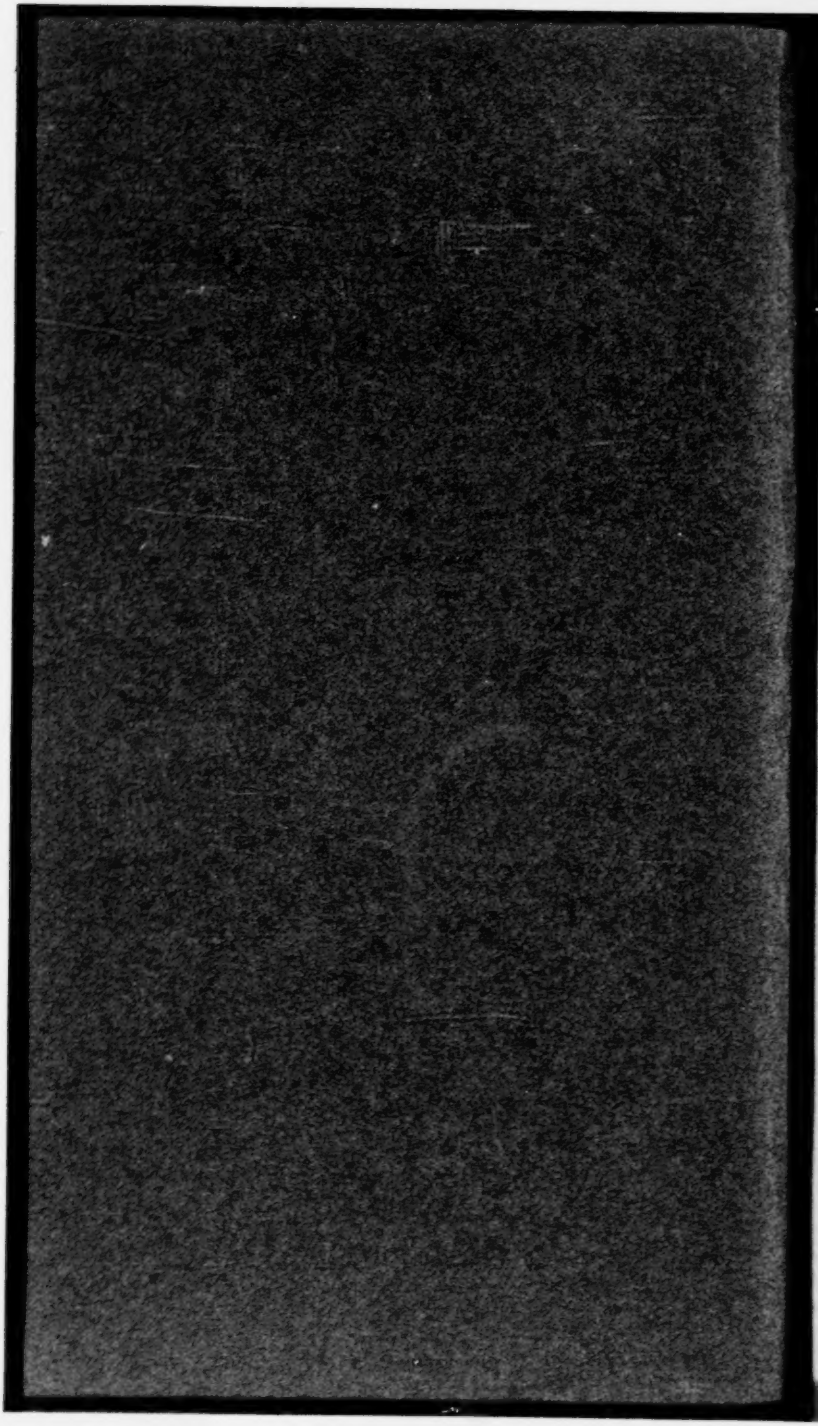
XXI.

That on or about the 9th day of July, 1906, long prior to the issuing of patent of the United Staes to said Carter, said Melvin J. Carter and Clara Carter, his wife, granted and conveyed to the defendant James A. Hower, as trustee, all their right, title and interest in said N. E. ¼ of Section 2, Township 27 North, Range 10 East. That the beneficiaries of the trust created by said deed, or the terms and conditions thereof, are not set forth in said deed and plaintiff has no knowledge or information concerning said beneficiaries or the terms and conditions of said trust.

That plaintiff is informed and believes that the defendant Nonpareil Consolidated Copper Company claims an interest or estate in said Section 2 adverse to plaintiff but plaintiff has no knowledge or information concerning the nature or extent of the interest so claimed.

XXII.

That on or about the 1st day of November 1907 the said The St. Paul, Minneapolis and Manitoba Railway Company granted,



Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 88.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

JAMES A. HOWER, individually and as Trustee; ANNA H. HOWER, wife of JAMES A. HOWER; NONPAREIL CONSOLIDATED COPPER COMPANY, ET AL.,
Defendants in Error.

In Error to the Supreme Court of the State of Washington

BRIEF FOR PLAINTIFF IN ERROR.

This is a suit brought by the plaintiff in error, Great Northern Railway Company, in the Superior Court of the State of Washington, in and for the County of Snohomish in said state, to establish title to the northeast quarter of Section 2, Township 27 north, Range 10 east, Willamette Meridian, in said county and state. The defendants demurred to plaintiff's amended complaint upon a number of grounds, among which was that the amended complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court; plain-

tiff elected to stand on its amended complaint and final judgment was thereupon entered by the Superior Court dismissing the suit. Plaintiff thereupon appealed to the Supreme Court of the State of Washington, where the judgment of the Superior Court was affirmed, whereupon plaintiff removed the case to this court by writ of error.

Paragraphs one to four of the amended complaint allege the status of the parties. Paragraphs five to eleven allege the enactment of the Act of Congress of August 5, 1892, (27 Stat. 390) and the selection on March 24, 1894, of the land in controversy by plaintiff's grantor, the St. Paul, Minneapolis and Manitoba Railway Company, hereinafter called the Manitoba Company, under and pursuant to the provisions of that act.

Paragraph twenty alleges that the land in question is rough and mountainous; densely and heavily timbered and wholly unfit for agriculture. Paragraph twenty-one alleges the conveyance by Melvin J. Carter, the entryman of said land, and wife, to the defendant, James A. Hower, as trustee, long prior to the issuing of the patent to said Carter. Paragraph twenty-two alleges the conveyance of all the interest of the Manitoba Company, in and to the land in question and other property, to plaintiff, Great Northern Railway Company. Paragraph twenty-three alleges that the land is vacant and unoccupied. This was for the purpose of showing that an action in ejectment will not lie and that the proper remedy is in equity.

Paragraphs twelve to nineteen, inclusive, are as follows:

XII.

"That on or about the 18th day of April, 1899, one Melvin J. Carter, filed in said district land office his application to enter said NE¼ of Section 2, Township

27 North, Range 10 East, under the homestead laws of the United States. In his application said Carter alleged and claimed that he settled on said land on the 1st day of December, 1893, and had maintained a continuous residence thereon since that time.

XIII.

That thereafter the district land officers duly ordered a hearing between said railway company and said Carter for the purpose of determining whether said Carter had settled upon the land embraced in his homestead application prior to the selection thereof by said railway company. That the evidence taken at said hearing showed that said Carter, on September 19, 1893, purchased the improvements of a former settler upon a tract of unsurveyed land on the left bank of the north fork of the Skykomish River a short distance below the mouth of a tributary of said river known as Trout Creek. That said Carter established a residence in the cabin of the former settler, and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he thereupon moved his family into said dwelling house and had continued to reside in said house and on said land with his family to the time of said hearing; that his improvements consisted of said dwelling house and a small clearing in which he set out trees and shrubbery and raised vegetables from year to year. The evidence taken at said hearing further showed that Carter's said improvements were all situated on the left bank of the north fork of the Skykomish River, about two or three hundred feet from said river and about one-half a mile below the mouth of said Trout Creek, and not upon the land applied for by said Carter under the homestead law. On said evidence the register and receiver, on August 28, 1903, held and decided that said Carter had duly settled upon the land claimed by him during the month of September, 1893, and had continued to reside upon, improve and cultivate said land to the time of said hearing on June 1, 1903, and that he should be allowed to enter the land applied for under the homestead law and that the railway company's selection thereof should be canceled.

XIV.

That the St. Paul, Minneapolis and Manitoba Railway Company duly appealed to the Commissioner of the General Land Office from said decision of the register and receiver, claiming and alleging among other things that the evidence produced at said hearing conclusively showed that the dwelling house and other improvements of said Carter were not on the land selected by said railway company and applied for by said Carter, but were and at all times had been situated more than three-eighths of a mile from said land. That the Commissioner of the General Land Office, on March 23, 1904, held and decided that said Carter had settled upon the land upon which his improvements were situated in the fall of 1893; that he had commenced his residence thereon with his family in the spring of 1894 and had continued to reside upon and improve same. The commissioner further held that the evidence taken at said hearing tended to show that said Carter's improvements were all situated on the NW¼ of Section 2, Township 27 North, Range 10 East, and not on the NE¼ of said Section 2. The commissioner thereupon directed the register and receiver of the Seattle Land Office to order a further hearing in said case to the end that it might clearly be shown on what quarter section Carter's improvements were situated and that said hearing should be strictly confined to the question of the location of Carter's improvements.

XV.

That a further hearing in said matter was duly ordered by and held before the register and receiver of the Seattle Land Office on the 16th day of December, 1904. That the evidence taken at said rehearing, conclusively showed that the improvements, including the dwelling house and residence of said Carter, were all situated on Lot 2 of said Section 2, Township 27 North, Range 10 East; that said Lot 2 is located in and is a part of the NW¼ NW¼ of said section, and that the east line of said lot is located a quarter of a mile west of the west line of said NE¼ of said Sec-

tion 2, applied for by Carter. That the evidence taken at said hearing further showed that at some time prior to said hearing said Carter had constructed or taken part in the construction of a trail up Trout Creek and extending over and across a part of said NE¼ of Section 2; that about the year 1899 there had been constructed on the northwesterly part of said NE¼ of Section 2 a small stable or barn and that said Carter had at times used said stable or barn for storage purposes. That upon the evidence taken at said rehearing the register and receiver of said Seattle Land Office on January 21, 1905, held and decided that all of said Carter's improvements were located on said Lot 2 of said Section 2.

XVI.

That thereafter and on the 30th day of June, 1905, the Commissioner of the General Land Office, on the evidence taken at said rehearing, held and decided that on or about September 19, 1893, Melvin J. Carter purchased the claim, cabin and improvements of a former settler; that he built for himself and family a new cabin on the claim purchased; that he lived in said cabin and cultivated a small tract of land on said claim; that about a year after his said settlement said Carter constructed trails across said Section 2 and up Trout Creek for the purpose of getting to different places on his claim; that he also built a barn or stable and used it for storing supplies; that a part of the trails and the stable or barn were on the NE¼ of said Section 2, and that the dwelling house and cultivated land were all on the NW¼ of said Section 2 about one-fourth of a mile west of the west line of the NE¼ of said section. That notwithstanding that the evidence produced at said rehearing failed to show that said Carter ever resided upon, improved or cultivated any part of the said NE¼ of Section 2, and did conclusively show that said Carter's dwelling house and cultivated land and improvements, except only said trails and stable or barn, which were constructed after said railway company's selection of said land, were situated more than one-fourth of a mile from said NE¼ and the Commissioner of the General Land

Office found such to be facts, said commissioner wrongfully and unlawfully and in fraud of said railway company's right to said land and to complete its selection thereof and to receive the patent of the United States therefor, further held, as a matter of law, that said Carter's residence was established and maintained in good faith and in the belief that his dwelling house was upon the land embraced in his homestead application and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the NE¼ of said Section 2, was a constructive residence on said NE¼, and that said Carter should be permitted to make homestead entry of said land and that the selection thereof by the St. Paul, Minneapolis & Manitoba Railway Company should be canceled.

XVII.

That the St. Paul, Minneapolis and Manitoba Railway Company thereupon duly appealed to the Secretary of the Interior from the said decision of the Commissioner of the General Land Office, alleging and claiming among other things, that said Carter had never resided upon, occupied, cultivated or in any manner improved the land embraced in his homestead application; that his dwelling house and improvements were situated more than a quarter of a mile from said NE¼ and that his acts did not constitute a settlement upon said NE¼ within the meaning of the homestead law. That thereafter ,and on the 23rd day of November, 1905, the Secretary of the Interior passing on said appeal, held the facts in said case to be as found by the commissioner in his said decision, and on said facts, wrongfully and in fraud of the right of said railway company to said land, held and decided as a matter of law that as said Carter was shown to have been a *bona fide* homestead settler upon unsurveyed land at the time the railway company made selection of the NE¼ of said Section 2 and subsequently complied with the law as to residence and improvements, he was constructively a settler upon said NE¼ and that his application to enter said land under the homestead law should be allowed and the selection thereof by said railway company canceled.

XVIII.

That said St. Paul, Minneapolis and Manitoba Railway Company's selection of said NE¼ of Section 2 was thereafter, pursuant to the said decision of the Secretary of the Interior, canceled by the Commissioner of the General Land Office. That thereafter and on the 16th day of March, 1906, said Melvin J. Carter was permitted to make and did make homestead entry of said NE¼ of Section 2; that thereafter, and on or about May 16, 1906, said Carter made the final proofs of settlement and cultivation required by Section 2291, Revised Statutes of the United States, and received final entry certificate for said land; and that thereafter, and on or about the 8th day of March, 1907, patent of the United States was issued to said Carter conveying to him the legal title to said land.

XIX.

That the said decisions of the Commissioner of the General Land Office and the Secretary of the Interior, and the cancellation of said railway company's selection, were, and each of them was, wrongfully and erroneously made through a mistake of law, in this, that it was in and by said decisions held that the settlement and residence of said Carter upon a tract of land situated one-fourth of a mile distant from the land sought to be entered by him was constructively, and within the meaning of the homestead law of the United States, a settlement upon the land last mentioned."

The plaintiff prayed for judgment compelling the defendants to convey legal title to it or declaring plaintiff the owner of the land in controversy and that the defendants have no right, title or interest therein.

In the Supreme Court of Washington plaintiff claimed that the facts as found by the officers of the Land Department of the United States conclusively show that Melvin J. Carter, defendants' grantor, never resided upon, cultivated or otherwise improved the land in controversy, or

any part thereof, as required by the homestead law and that the decisions of the Commissioner of the General Land Office and the Secretary of the Interior allowing him to make homestead entry of said land and cancelling the Railway Company's selection thereof were wrongfully and erroneously made through a mistake of law. This claim was denied by the decision and judgment of the Supreme Court of Washington.

ASSIGNMENTS OF ERROR.

Plaintiff in error alleges and submits that the Supreme Court of the State of Washington in its decision and judgment herein erred in this, to-wit:

1. That the said Supreme Court in and by said judgment held that the homestead right of Melvin J. Carter had attached or been initiated to the land in controversy in said action prior to the selection of said land by the grantor of plaintiff in error under the Act of Congress, approved August 5, 1892.

2. That the said Supreme Court in and by said judgment held that the residence of the said Melvin J. Carter as alleged and described in the amended complaint in said action was a residence upon the northeast quarter of Section 2, Township 27 north, Range 10 east, Willamette Meridian, within the requirements of the homestead laws of the United States, and in refusing to hold that said residence was, as a matter of law, not a sufficient compliance with the said homestead laws.

3. That the said Supreme Court in and by said judgment held that the said defendants had showed a prior right and in failing to hold that the said defendants hold the legal title to said land and premises in trust for plaintiff and to adjudge and decree that said defendants execute and deliver to plaintiff a deed conveying the said land and premises to plaintiff.

ARGUMENT.

By Section two of the Act of Congress of August 5, 1892, 27 Stat., 390, the Manitoba Company is authorized to select, in lieu of lands in the States of North Dakota and South Dakota relinquished by it pursuant to the provisions of Section one of the said act, "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey which has been or shall be made, of the United States not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection."

By the Act of May 14, 1880, settlers under the homestead law are given three months after settlement, or after survey if the settlement be upon unsurveyed land, within which to file their claims and it is provided that their rights shall relate back to the date of settlement the same as under the pre-emption law.

It follows that if Carter was an actual settler on the land in question at the time of the Manitoba Company's selection thereof, his rights under his entry and patent were and are prior and superior to those of plaintiff in error's grantor, the Manitoba Company.

St. P. M. & M. Ry. Co. v. Donohue, 210 U. S. 21.

The amended complaint alleges and the demurrer admits that plaintiff's grantor duly selected the land in question, it being then unsurveyed, March 24, 1894, under Act of Congress of August 5, 1892; that the selection fees were duly paid; that the selection was accepted and approved by the district land officers; that the plat of sur-

vey was filed in the district land office, April 11, 1899; that on that day plaintiff's grantor filed in the district land office its supplemental selection list adjusting the selection to the lines of the government survey and that the land was non-mineral and was so classified as non-mineral at the time of the government survey. That on April 18, 1899, Carter filed his homestead application to enter the land, alleging settlement thereon December 1, 1893.

As the claim of the grantor of plaintiff in error to the land in question was passed upon by the proper officers of the Land Department and as a result of the controversy before those officers patent of the United States was issued to Melvin J. Carter, defendants' grantor, the facts found by the officers of the Land Department in this controversy are not here open to review, but courts of equity have jurisdiction to correct mistakes, to relieve against fraud or to afford a remedy when it becomes apparent that the officials of the Land Department have, by erroneous construction of law, given to one claimant public land which upon the undisputed facts should have been patented to another. This principal is too thoroughly established to require citation of authority.

Prior to the hearing on the demurrer in the Superior Court of Snohomish county, it was stipulated by the parties to the action that in passing upon the demurrer, the court might consider the decisions of the Register and Receiver, the Commissioner of the General Land Office and the Secretary of the Interior referred to in the amended complaint. Copies of the said decisions stipulated to be true copies thereof were attached to the stipulation and are a part of the record herein.

The facts as found by the officers of the Land Department, as plaintiff in error understands them, are alleged in the amended complaint and are, of course, admitted by the demurrer, except insofar as the allegations of the complaint may be modified by the findings of facts as set forth in the decisions of the land officers which accompanied the stipulation above mentioned.

Briefly stated the facts as found by the officers of the Land Department are that one Doolin settled on what is now known as Lot 2, Section 2, Township 27 North, Range 10 East; that one Moe settled on the same lot a short distance below Doolin, the land being then unsurveyed; that Melvin J. Carter and E. B. Carter, his father, purchased their improvements during the month of September, 1893, Melvin Carter buying the cabin and improvements of Doolin, and E. B. Carter the cabin and improvements of Moe. That Melvin J. Carter went upon the claim purchased by him during the month of September, 1893; that he lived in the purchased cabin and commenced building a new house which he finished in the spring of 1894; that he then moved into the new house with his family, consisting of his wife and daughter; that he furnished the house and he and his family lived therein until the time of the hearing. That he cleared a small parcel of land near the bank of the Skykomish River on which he raised vegetables, planted a few fruit trees, flowers and shrubbery. That his business compelled him to remain away from the claim a considerable portion of the time, but his wife remained thereon all of the time except in the winter or rainy months when she left on account of heavy snows and high water. That he registered and voted as a qualified voter in the city of Seattle during the years 1896 and 1898,

claiming to be a resident of that city. That about a year after his settlement, which was after the Railway Company's selection was made and filed in the District Land Office, Melvin J. Carter, with the assistance of his father, constructed trails across the section and up Trout Creek for the purpose of getting to different places on the claim. That he built a small barn or stable which he used for storing supplies, etc., and that he also posted notice of his claim near the north line thereof. That the notice, trails and barn are on the NE¼ of the section, but the house and cultivated ground are on the NW¼ something over a quarter of a mile west of the quarter section line between the NE¼ and the NW¼.

In order to a complete understanding of the situation, a description of Section 2, Township 27, North, Range 10 East is necessary. The northeast quarter is a full quarter section, containing 160 acres. The northwest quarter is intersected by the north fork of the Skykomish River. This river, which is a meandered stream, intersects the north line of the quarter section at the quarter quarter section corner and flows southwesterly across the northwest quarter of the northwest quarter of the section. Lot 1 comprises the northeast quarter of the northwest quarter of the section. Lot 2 comprises that part of the northwest quarter of northwest quarter of said Section 2 that lies southeasterly of the north fork of the Skykomish River. Lot 1 lies between Lot 2 and the Northeast quarter of the section, the land in controversy herein. Lot 3 comprises that part of the northwest quarter of northwest quarter that lies northwesterly of the said river. The south half of the northwest quarter is a full 80-acre tract. The southwest quarter of the section is a full quarter

section. The southeast quarter of the section is mountainout and unsurveyed. The northeast quarter of the section is intersected by a small mountain stream, known as Trout Creek, which rises in the northwest quarter of section 1 and flows northwesterly across the northeast quarter of section 2 and empties into the north fork of the Skykomish River at a point in Section 35, Township 28 north, Range 10 east, about one-half mile northeasterly of the nearest point on Lot 2 of Section 2.

While the facts found by the officers of the Land Department are conclusive, the conclusions drawn by those officers from facts found may be re-examined and corrected by the Court if found to be erroneous. The undisputed fact in this case is that Carter's dwelling house and all his improvements, except only a small barn, a part of his trail and his claim notice, if a claim notice can be called an improvement, are situated on lot 2, section 2, more than a quarter of a mile distant from the nearest point of the northeast quarter of the section, which he sought to enter.

It will be observed that none of the officers of the Land Department specifically finds when the barn which is situated on the northeast quarter of the section was constructed. The Register and Receiver specifically found that Carter's improvements made in connection with his homestead claim were on lot 2. (Record, pages 23 and 24.) The Register presided at the hearing and the witnesses testified in his presence. When the Register and Receiver made their decision they had before them, as their decision shows (Record, page 23), a plat prepared by an experienced and competent surveyor, made after an actual survey showing the location of Carter's improvements, and showing, among other things, the small barn

located on the northeast quarter of the section. The evidence produced at the hearing before the Register and Receiver conclusively shows that the barn in question was constructed not earlier than the year 1899, upwards of five years after the Manitoba Company's selection of the northeast quarter and five and one-half years after Carter's settlement on lot 2. With this evidence and the plat above mentioned before them, and knowing the topography of the section, it is obvious that the Register and Receiver gave no effect to the construction of the barn and trail on the northeast quarter as improvements made in connection with Carter's homestead claim, and accordingly held that all of his improvements made in connection with his homestead settlement were on lot 2.

Neither the Commissioner nor the Secretary made specific findings of fact, but merely recited in narrative form what they considered the material facts. Referring to the trail and so-called barn on the northeast quarter of the section the Commissioner said (Record page 25) that about a year after his settlement, Carter, with the assistance of his father, constructed trails across the section and up Trout Creek for the purpose of getting to different places on his claim and that he built a barn on the northeast quarter of the section which he used for storing supplies, etc.

An examination of the decisions of the Commissioner and Secretary (Record, pages 24 and 25) conclusively shows that while they gave effect to Carter's construction of the barn and trail on the northeast quarter as improvements made in connection with his homestead claim on lot 2, they wholly failed to find that the said trail and barn were constructed before the land was selected by the

Railway Company. On the other hand, if the Commissioner's decision be given effect as a finding that the said barn and trail were constructed about a year after Carter's settlement on lot 2, then it follows that they were not constructed until about December, 1894, nine months after the Railway Company's selection. That the said barn was in fact constructed at a much later date than Carter's dwelling house and other improvements, and after the Railway Company's selection, is obvious from the Commissioner's decision of June 30, 1905. In the argument before the Commissioner it was urged by the Railway Company that the said barn was not constructed until 1899, long after the Railway Company's selection and that no claim on Carter's part could be based on the construction and subsequent occasional use of the barn. Meeting this contention, the Commissioner said that the date of such improvements is not material since they were made in furtherance and continuance of a settlement made prior to such selection (Record, page 25).

WAS CARTER'S SETTLEMENT AND RESIDENCE UPON LOT TWO OF SECTION TWO, A SETTLEMENT AND RESIDENCE UPON THE NE¼ OF SAID SECTION, WITHIN THE MEANING OF THE HOMESTEAD LAW?

From the foregoing it is obvious that this case is confined to a single question, and that is, was Carter's settlement and residence upon Lot 2 of Section 2, when taken in connection with the construction by him, long after the Railway Company's selection, of a small barn or stable on the northeast quarter of the section, and the subsequent use of such barn or stable for storing supplies, a settlement upon the northeast quarter within the meaning of the

homestead law, taking effect from the date of his original settlement on Lot 2?

Residence upon the land sought to be entered under the homestead law is an essential requirement of that law. Sections 2289, 2290, 2291, 2297, Revised Statutes. This is so expressly stated in the law and has been so repeatedly decided that citation of authorities is unnecessary.

The facts found show that Carter's residence, cultivated land and all of his improvements, except only the trail, barn and claim notice, are situated on Lot 2 of Section 2, or the northwest quarter of the northwest quarter of said section, more than a quarter of a mile from the land in controversy, another forty-acre tract, to-wit, Lot 1, or the northeast quarter of northwest quarter, which he never at any time or in any manner asserted or claimed a right to enter, being interposed between them. The facts which go to show Carter's good faith in claiming the northeast quarter may not open to review, but the conclusions to be drawn from those facts may be re-examined and corrected.

That Carter, on the facts found, was a settler in good faith on Lot 2 must be conceded, but it should be borne in mind that he purchased the improvements, including the dwelling house, of a former settler and immediately established his residence in such dwelling house. Presumably this dwelling house was on the claim purchased and his intention at that time must have been to claim the land whereon the dwelling house was situated. The land was unsurveyed when he purchased the claim, settled and established his residence in 1893 or 1894 and so remained until 1899, a period of six years. The nearest corners of the government surveys were many miles distant. The

country was mountainous and broken. Until the survey was actually made the official description of the land embraced in his claim could not be known. How then can it be said in reason that he believed his claim was located on any specific official tract, least of all, that he intended to claim an entire one hundred and sixty acre tract, the nearest point of which was upwards of a quarter of a mile from his dwelling house wherein he resided and his other improvements? If such was his intention it was in direct violation of the requirements of the homestead law. The only possible inference from his acts is that he claimed, and on survey intended to enter, the land on which his residence, cultivated land and other improvements were situated, by whatever official description such land might be known when surveyed, together with sufficient contiguous land to make 160 acres. The undisputed facts as they appear in the record show that he made no effort whatsoever to do this. He never at any time sought to enter Lot 1 which adjoins the land on which his improvements were situated, or the adjoining land in Section 35, Township 28, North, Range 10 East, on the north. On the contrary, he surrendered his claim to Lot 2 to his father and applied to enter the northeast quarter of the section, on which he had made no improvements whatsoever at the time he filed his homestead application. And the officers of the Land Department and the courts of the State of Washington have recognized his right to enter the northeast quarter of the section upon the sole ground that his settlement and residence upon Lot 2 were constructively a settlement and residence upon the northeast quarter, and this notwithstanding the fact that an entire forty acre tract, Lot 1, lies between the land on which his improvements were situated and the land entered by him.

The question of the location of the dwelling house, the place of the claimant's residence in homestead and preemption claims, off the land claimed has arisen in the department in a number of cases and such residence has frequently been recognized as a sufficient compliance with the requirements of the law, but in all the cases where so recognized the residence was but a short distance from the line, was moved onto the land claimed as soon as the mistake was discovered and in nearly all, if not all, of these cases there were substantial improvements on the land claimed. The Supreme Court of Washington cites and relies on a number of these cases, to-wit:

Falkington's Heirs v. Hempfling, 2 L. D. 46;
Lewis C. Huling, 10 L. D. 83;
Kendrick v. Doyle, 12 L. D. 67;
Staples v. Richardson, 16 L. D. 248.

And the court said that in one of such cases, Keogle v. Griffith, 13 L. D. 7, it affirmatively appeared that the claimant's improvements were about forty rods from the land entered and yet a patent was awarded. An examination of these cases will show that they do not support the proposition that residence on one tract of land will support a claim to enter under the homestead law another and distinct tract of land more than a quarter of a mile distant and on which the homestead claimant has placed no substantial improvement whatsoever.

In Falkington's Heirs vs. Hempfling, 2 L. D. 46, it appeared that in the year 1860, Falkington built a house where he resided with his family until on or about March 28, 1872, when the house was burned; that he and his witnesses supposed that the house was upon the tract covered

by his entry when he made his proof August 20, 1872, but a survey made after his death showed the house to have been some thirty feet outside the quarter section line bounding his claim. His other improvements, consisting of a stable and corn crib, cultivated land and an orchard, were on the land covered by his entry. On these facts the Secretary held that his residence, established and continued as it was in good faith, was a constructive residence upon the land claimed by him and was sufficient to support his entry thereof.

In Lewis C. Huling, 10 L. D. 83, the facts were that the claimant consulted a surveyor, who examined the township plat and told him that the house stood upon the land claimed by him, and that he had no reason to suspect any mistake until after he had made his final proofs when a desert entry on adjoining land was being surveyed. That he then got a compass and ran the line of his claim and discovered that the building was just north of his line, upon the desert land claim. It further appeared that another surveyor had run the line for him and that such line intersected the house in which he lived. The Secretary held that under these circumstances his residence, made as it was in good faith, was sufficient to support his pre-emption claim.

In Kendrick v. Doyle, 12 L. D. 67, it appeared that the entryman Doyle built a cabin on or near his land in 1882 and immediately established his residence therein. The witnesses on both sides agreed that the southwest corner of the land involved was in doubt; that there had been a number of surveys made of the section and that five different surveyors disagreed each with the rest as to the loca-

tion of the corner. On these facts the Secretary held that it was still in doubt whether on an accurate survey the entryman's house would be on or off the land and that it was immaterial for the purposes of the case, in view of the fact that the evidence was sufficient to show that the entryman could easily have been honestly mistaken.

In Staples v. Richardson, 16 L. D. 248, the distance of the claimant's dwelling house from the land entered by him is not shown by the reported decision. It does appear, however, that immediately upon discovering the fact that his house was a short distance off the land entered, he built another house on such land.

In Keogle v. Griffith, 13 L. D. 7, specifically referred to by the Supreme Court of Washington, it appeared that Griffith made homestead entry, January 21, 1884; that on June 15, 1887, he gave notice of his intention to submit commutation proof; that the proof was duly submitted on said day and that Keogle on the same day filed affidavit of contest, alleging that Griffith had never resided upon the land claimed by him. A hearing was ordered and from the evidence produced thereat it appeared that in the spring of 1883 Griffith purchased a relinquishment of the land from a former entryman and settled upon it. In the fall of 1883, he built a farm house, barn, etc., and lived with his family in the house until March, 1884. He then had the land surveyed and discovered for the first time that his improvements were about forty rods from the land he had entered. He thereupon built a new house upon the land included in his entry, into which he moved and in which he resided until the hearing. It appears from the reported decision that his second house was

built in March, 1884, immediately after he learned that his first house was not on the land embraced in his entry. This was more than three years before the contest against his entry was brought. The Secretary found that his residence on the land, after the erection of the second house, was continuous and that the erection of the first house off the land was the result of a mistake, and held his residence to be sufficient to support his homestead entry. It is difficult to see wherein this case supports the contention that the establishment of a residence and the making of improvements on one tract of unsurveyed land, will, on the survey six years later, support a right to enter another and distinct tract more than a quarter of a mile distant, on which the claimant has made no substantial improvement whatsoever.

Many of the decisions of the Department on this question are rested on the decisions of the Supreme Court of the United States in the case of Lindsay vs. Hawes, 2 Black 554. In that case, and in Silver vs. Ladd, 7 Wall. 219, which follows it, the dwelling house was on the boundary line of the land claimed, while the claimant's barn, workshop and cultivated land were wholly on the land claimed. The court held that the claimant's residence was on both the land claimed and on the adjoining land and that a residence on both tracts was a residence on the land claimed. Giving these cases their fullest effect they do not support the proposition that settlement, residence and improvement upon one tract of land will support a claim under the homestead law to another and distinct tract, a quarter of a mile distant from the first tract, and between which tracts, another forty-acre tract is interposed.

On the other hand both the department and this court have held in a number of cases that residence upon one tract of land will not support a pre-emption or homestead claim to another and distinct tract, even where the claimant has made substantial improvements upon the latter.

In Guyton v. Prince, 2 L. D. 143, the facts were that Prince at the time of entry was residing on a tract adjoining the land embraced in his homestead entry which he had purchased from a railroad company; there were then two cabins on the homestead land, one of which was built by Prince. Also a stable, smoke house and other outbuildings. After entry Prince cultivated and improved the homestead land in connection with the railroad land, both of which tracts were enclosed in one parcel, and with the exception of a few sojourns of one or two weeks' duration in the cabins on the homestead land, resided upon his railroad land. On these facts the Commissioner held that his residence upon the homestead land was not sufficient to support an entry thereof under the homestead law. The Commissioner said:

> "The point remaining to be considered, therefore, and the only one, in fact, that would appear to be in issue, is the alleged failure of defendant to establish residence upon the land embraced in his entry within six months after date thereof, and to thereafter continue such residence without interruption. That the evidence adduced at the trial of the case clearly proves the defendant's failure in this respect I think there can be no doubt, and the question therefore arises, is such failure one that may be remedied or overlooked where it is in evidence that during the whole period since date of entry, nearly three years, the homestead claimant has continued to cultivate and improve the land included in his entry in a substantial manner, but lived in a house situated on adjoining land, which

is owned by himself, and which he had inclosed, cultivated and improved as one body of land in connection with his homestead tract? I must decide in the negative. The provisions of the homestead law are stated in plain and unequivocal terms. They make residence on the homestead tract a vital pre-requisite or condition precedent to entitle the homestead claimant to a patent."

In the case of Edson O. Parker, 8 L. D. 547, Parker made scrip location of unsurveyed NE¼ SE¼ of a certain section. When the survey was made he made homestead entry for the remaining three quarters of the quarter section. His residence and most of his improvements were on the scrip claim, until he made his homestead entry, when he removed upon the lands embraced in said entry. The Secretary held that he was not a settler on the homestead land until he moved his residence thereon and that he was not entitled to credit for the time of his residence on the scrip land.

In the case of Thomas D. Harten, 10 L. D. 130, the Secretary held that residence held under a possessory claim upon a tract adjacent to land claimed by the same person under the homestead law and included within the enclosure of the homestead claim will not support an entry under the homestead law. In that case Harten had purcharged a possessory right which embraced the land which he afterwards entered under the homestead law. After the survey of the land, the house occupied by Harten and in which he had resided from the time of his purchase of the possessory claim was found to be on the possessory claim, but off of and about two hundred feet from the line of the homestead claim. His garden, spring of water and threshing floor were upon the homestead land and were

enclos
125 a ed with the possessory claim. He had cultivated
chase. res of the homestead land from the time of his pur-
house After making his homestead entry he built a
20 ac on the homestead land and cleared and broke 15 or
ments es of the said land. The total value of improve-
he ma on the homestead land amounted to $500.00. After
land de homestead entry he occupied the house on the
missio ncluded therein one night each month. The Com-
was n ner held that his residence on the homestead land
law ar t such as to meet the requirements of the homestead
d this decision was affirmed by the Secretary.

In
peared the case of Warren Bowen, 41 L. D. 424, it ap-
under Bowen had made an enlarged homestead entry,
of Sec act of February 19, 1909, for the northeast quarter
Mexic tion 12, Township 10 north, Range 36 east, New
cluded. When he presented his homestead proof he in-
ship 1 therein the northwest quarter of Section 7, Town-
His d north, Range 37 east, which had not been surveyed.
corner elling house was situated on or near the southwest
reside of the northwest quarter of Section 7. He had
about therein to the date of his proof and had cultivated
The Se five acres in the northeast quarter of Section 12.
presum cretary held that while the unsurveyed land would
tion 7, ably be described as the northwest quarter of Sec-
survey it was not and would not be subject to entry until
and th d, and that the action of the Register and Receiver
said la e Commissioner in refusing to accept proof as to
Bowen nd was correct. The Secretary further held that
upon t s house was built and his residence maintained
survey e unsurveyed tract in Section 7 and not upon the
entry. d northeast quarter of Section 12 embraced in his
That such residence was established upon the un-

surveyed tract in order to hold the same and in the belief that residence thereon could be counted as residence upon the entire claim. The Secretary further held that such residence would not support a homestead entry of the northeast quarter of Section 12 and therefore suspended the entry subject to future compliance with the law as to residence on the land included therein.

In Ferguson v. McLaughlin, 97 U. S., 174, the facts were that two persons settled on two distinct and separate but contiguous parcels of unsurveyed land. Ferguson bought the rights of both these parties. On one of the tracts there was a dwelling and other valuable improvements and Ferguson resided on that tract and cultivated and pastured both tracts. By virtue of an act of the legislature of California, passed in 1866, the parcel upon which Ferguson's residence was situated, and the possessory right to which had been acquired by him, was included within the limits of the Town of Santa Clara. By the plat of the United States survey filed in May, 1866, it appeared that the tract, the possessory right to which had been acquired by Ferguson and which was outside of the corporate limits of Santa Clara, fell in Township 6. Thereafter, Ferguson filed his declaratory statement claiming the right to enter said parcel under the pre-emption laws. Subsequently in October, 1866, the plat of survey of Township 7, which embraced the Town of Santa Clara and, therefore, the residence tract of Ferguson was filed. Ferguson then sought to amend his former declaratory statement so as to include the parcel of land situated in the Town of Santa Clara upon which his residence and other improvements stood. The Register and Receiver refused to allow this to be done and required Ferguson to

make a separate declaratory statement for that parcel. Subsequently, pursuant to the provisions of an Act of Congress, Ferguson, as the possessor of the land and improvements, became the owner of that parcel. In a contest in the land office between Ferguson and a railway company claiming under a congressional grant, which contest related solely to the parcel of land in Township 6 and upon which he filed his first declaratory statement, the local land officers decided that Ferguson was not entitled to the land in Township 6, which he claimed as a pre-emptor, upon the ground that his dwelling house was not upon the land so claimed. This action was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior and patent issued to the railway. The grantee of that company brought ejectment against Ferguson in a state court of California. The trial court, as did the Supreme Court of California, sustained the correctness of the ruling of the Land Department, whereupon the case was taken to the Supreme Court of the United States, where the action of the California court was affirmed. The court said:

> "The Act of Congress of 1853, 10 Stat. at L., 244, which provides for the survey, pre-emption and sale of public lands in California, and which was before this court in the case of Sherman v. Buick, 93 U. S. 209, declared that all those lands, with certain exceptions not pertinent to this case, should, whether surveyed or unsurveyed, be subject to the pre-emption laws of the 4th of September, 1841, with all the exceptions, conditions and limitations therein contained. One of the limitations is, that the person claiming the right of pre-emption to any part of the public land must have erected a dwelling-house and made an improvement thereon, and that the congressional subdivision for which claim is made must include the claimant's residence. It is true that, under that law,

no valid se ttlement could be made until after the land had been s surveyed, and the party could know just where he w was making his residence, with reference to the congre ssional subdivision which he proposed to claim; whi ile under the Act of 1853 he could settle before the surveys and make his claim after they had been made and filed in the local office. The officers of the Lan d Department, have, however, held that when he co mes before them finally to assert his claim he could n ot establish a valid claim for any quarter section or any part of a quarter section, unless his dwelling h ouse, his actual residence, was on some part of tha t quarter section. In this construction of the Act of 1853 we concur, and it is fatal to the case of plaintiff in error. And this question of law is the only one of which this court can have jurisdiction in the present case. It appears very clearly by the facts found that Ferguson's original claim or settlement of about 150 acres is subdivided by the township line which runs between townships six (6) and seven (7) south, of r ange one (1) west of the Mount Diablo meridian, a nd that about thirty acres, including his residence, t ell within the latter. He afterwards se-cured a titl e to this as a settler on land granted to the Town of Sa nta Clara by Act of Congress, which Act provided th at the grant should inure to the benefit of those who v ere actual settlers on any part of it. As we have al ready said, the Land Office held that this fact was fa tal to his right of pre-emption in any portion of tow nship six, though it adjoined his land in the other to wnship, and was part of his improvement."

The facts in t he case cited are not fully set out in the official report, b ut in St. P. M. & M. Ry. Co. v. Donohue, 210 U. S. 21, the court made an extended examination and explanation of t he said case and in so doing stated the facts involved t herein substantially as herein set forth. It is true that t e Ferguson-McLaughlin case arose under the Act of Cong ress of March 3, 1853, 10 Stat. 244, providing for the su rvey of the public lands in California and granting pre-em ption rights therein. By said act the

right of pre-emption in the public lands in said state, whether surveyed or unsurveyed, is granted, subject to the general pre-emption law of September 4, 1841, with the exceptions, conditions and limitations therein contained. This case arises under the homestead law, but the residence required under the homestead and under the pre-emption law does not differ in quality but only in the length of time prescribed therefor.

Child v. Minor, 15 L. D., 574.

In Nix v. Allen, 112 U. S. 129, Nix asserted title under an act of the legislature of Arkansas, granting pre-emption rights on lands granted to that state to aid in the construction of a certain railroad. The land in question was of the class so granted. It appeared that Nix was the owner of and resided upon the northeast quarter of a certain quarter section and claimed the right, by reason of such residence, to enter the remaining three-quarters of the quarter section which he had cultivated and improved. Passing on this claim the court said:

> "This appellant, on the 8th of March, 1870, resided on the northeast quarter of the quarter section. That land the company neither owned nor claimed. It was entered and paid for by Mrs. Nix in 1854, and she deeded it to the appellant in 1858. His title to that part of the quarter section is not disputed, and his residence has always been there. He cultivated parts of the other quarters of the quarter on the 8th of March, 1870, but he did not reside upon them or either of them. Under the circumstances, his residence was, in law confined to the land he owned. Seeing this difficulty, he applied for the purchase of the whole quarter section, basing his claim apparently on the original settlement and declaratory statement of his mother for the pre-emption of that tract. In this way he sought to connect his residence upon the NE¼ with his occupation of the other quarters. That he cannot do, as by the entry of the NE¼ his mother

separated her residence from the rest of the quarter section, and he has done nothing since to change that condition of things. It follows that the appellant is not entitled to the privileges of the Act of 1871, and his claim, both under the Acts of Congress, and those of the State, has failed."

The foregoing authorities amply sustain the proposition here contended for, that is, that Carter's settlement and residence upon Lot 2 of Section 2 will not support his claim of a right to enter under the homestead law the northeast quarter of said section, which is situated a quarter of a mile distant from the land on which his dwelling house and other improvements are situated.

It is true that the officers of the land department found that Carter built a small barn or stable on the northeast quarter of the section, which he used for the purpose of storing supplies and that he constructed a trail leading to this barn, a part of which is on the northeast quarter. The officers of the Land Department, however, do not find when this trail and barn were constructed. As we have shown their decisions are wholly silent as to the time of such construction. The evidence produced at the hearing, however, shows that the barn was in fact built in 1899, more than five and a half years after Carter's settlement and five years after the selection of the land on which it is situated by the Railway Company. That the Commissioner conceded that it was in fact constructed subsequent to the company's selection is obvious from his answer to the company's allegation to that effect, wherein he says that the time of construction is immaterial for the reason that it was in furtherance and continuance of Carter's settlement on lot two. The Commissioner's position on this point cannot be supported. Conceding, as we

must, that Carter's rights under the Act of May 14, 1880, took effect from the time of his settlement, his settlement did not in fact cover the northeast quarter of section two or any part thereof. He in no way, by improvement or otherwise, identified himself with that quarter section until long after the Railway Company's selection of the land. His settlement and residence on lot two cannot, therefore, be given a retroactive effect as a settlement and residence on the northeast quarter of said section two, so as to defeat the Railway Company's selection of said northeast quarter.

The record wholly fails to show, and no claim was ever made, that Carter ever at any time cultivated or attempted to cultivate any part of the northeast quarter of the section, or to occupy or use any part thereof for any purpose whatsoever, save only the use of the small stable or barn situated thereon for storing supplies. When we consider the topography of the north half of section two, the unfitness and impracticability of his using this barn for family storage purposes is obvious. The complaint alleges, and the demurrer admits, that the land is rough and mountainous, densely and heavily timbered and wholly unfit for agriculture. The north fork of the Skykomish River flows through a narrow mountain valley. Trout Creek, on which the barn is situated, likewise lies in a very narrow mountain valley, so narrow in fact throughout almost its entire length, as to partake of the character of a gorge or canyon. To reach the barn from Carter's house on lot two, one must travel northeasterly up the bank of the north fork of the Skykomish River to the mouth of Trout Creek, about three-eighths of a mile, then southeasterly up Trout Creek about one quarter of a mile, or five-eighths

of a mile in all, making one mile and a quarter going and returning. Under these conditions Carter's use of the barn for any purpose must have been desultory and limited. The record is wholly silent as to Carter's ownership of any livestock which might have been quartered in this barn. In fact, he owned none.

There would seem to be little or no room for doubt that when the plat of the survey of Township 27 North, Range 10 East was filed in the district land office in April, 1899, Carter for the first time found that both he and his father were residing on the same government subdivision and that he then built the small cabin or barn, or took possession of an abandoned miner's barn on the northeast quarter of the section which he used, as found by the Commissioner and Secretary, "for the purpose of storing supplies." This he no doubt did for the purpose of supporting a claim to a right to make homestead entry of the northeast quarter of the section, although he must then have known that his residence, cultivated land and other improvements were all on lot 2. But whatever his motives may have been, it is absolutely certain, as found by the Register and Receiver, the Commissioner and the Secretary, that his dwelling house, in which he and his family resided, his cultivated land, and all his other improvements, save only the barn or storage cabin, are on lot 2, more than a quarter of a mile from the northeast quarter of the section. It is also certain that while the Commissioner and the Secretary found that he used the barn on the northeast quarter "for storing supplies" they fail to find that he ever, at any time, resided upon, occupied, cleared, cultivated or used the northeast quarter or any part thereof, except such use as he made of the barn or storage cabin for storage purposes.

Giving the facts as the officers of the department found them to be their fullest effect they fail to show that Carter's right or claim to the northeast quarter under the homestead law had attached or been initiated at the time of the selection thereof by the Railway Company, and on the contrary, affirmatively show that his claim of a right to make homestead entry of said quarter section cannot be sustained without violating one of the essential requirements of the homestead law, that is, the establishing of an actual personal residence on the land sought to be entered and the continuing of such residence throughout the entire homestead period.

Both the Commissioner and the Secretary lay stress upon the fact that Carter posted notices of his claim on the northeast quarter. That Carter did in fact post notices of his claim at various places thereon is no doubt true and the evidence showed that one or more of these notices may have been along the north line of the northwesterly part of the northeast quarter of the section. But however this may be, the posting of a claim notice is not a requirement of the homestead law and a right of homestead cannot be initiated or supported by posting a claim notice where there has never been an actual *bona fide* settlement and residence on the land claimed.

It is respectfully submitted that the Supreme Court of Washington erred in holding that the land in controversy was rightfully awarded and patented to Melvin J. Carter,

defendant's grantor, and that the judgment of the said court should be reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 88.

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

JAMES A. HOWER, individually and as Trustee; ANNA H. HOWER, wife of JAMES A. HOWER; NONPAREIL CONSOLIDATED COPPER COMPANY, *et al.*,
Defendants in Error.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR DEFENDANTS IN ERROR.

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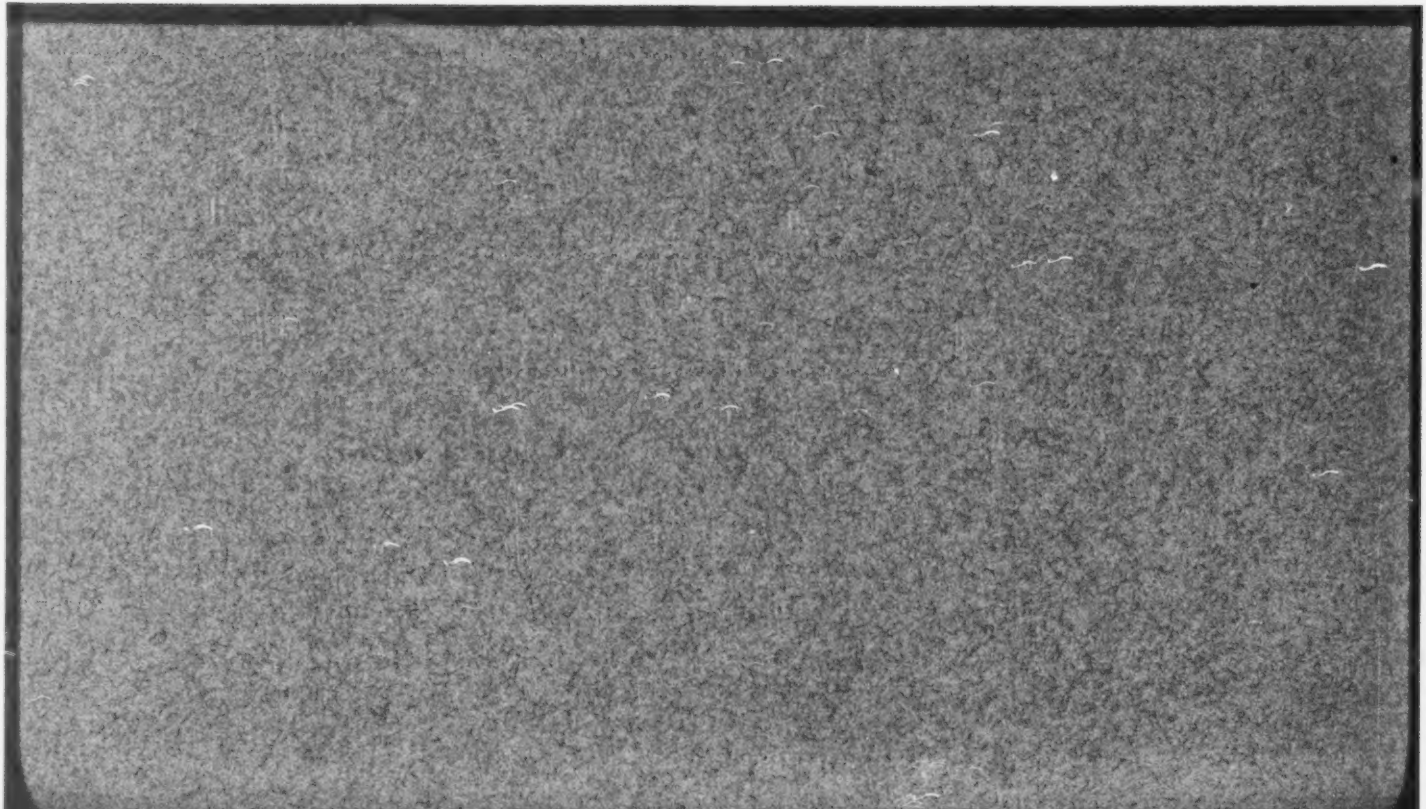

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Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

This is a suit begun by the plaintiff in error in the Superior Court of the State of Washington to obtain title to a quarter section of land in said State and brought to this Court after the affirmance by the Supreme Court of said State of the final judgment

of said Superior Court dismissing the suit (Record, p. 13).

The pleadings consist of the amended complaint (Record, pp. 2 to 9) and the demurrer thereto upon all the statutory grounds (Record, p. 11).

Before the demurrer was submitted to the trial Court, a stipulation was entered into by the parties to the effect that in passing upon the demurrer the Court might consider the decisions of the Land Department referred to in the amended complaint, copies of which decisions were annexed to the stipulation (Record, pp. 17 to 29).

The facts may be briefly stated as follows:

The plaintiff's predecessor in interest, the St. Paul, Minneapolis and Manitoba Ry. Co., on March 24, 1904, filed its so-called scrip on the northeast quarter (N. E. 1/4) of Section two (2) Township twenty-seven (27) North, Range ten (10) east. On April 18, 1899, the official plat of the Government survey of the township in which said land is situated having just been filed, one Carter, the respondents' grantor, made application to the local land office to enter said land, alleging settlement thereon on December 1, 1893, and continuous residence thereafter. Owing to the conflict between Carter's application and the railway company's selection, the district land officers ordered a hearing for the purpose of determining whether Carter had settled upon said land prior to the selection thereof by the railway company. The evidence taken at that hearing shows that Carter on September 19, 1893, purchased the improvements of a former settler upon a tract of unsurveyed land and established his residence therein and commenced the construction of a new dwelling which he finished in the spring of 1894; that he thereupon moved his family into said dwelling and continued to reside therein with his family to the time of said hearing; that his improve-

ments consisted of said dwelling and a small clearing in which he set out trees and shrubbery and raised vegetables from year to year. After the land had been surveyed and after Carter had made his application, it turned out that his house was on the Northwest quarter (N. W. 1/4) instead of the Northeast quarter (N. E. 1/4), but that he had constructed certain improvements by way of trails on the N. E. 1/4 and had built thereon a stable or barn and had used the same for storage purposes and that it was upon the N. E. 1/4 that he had posted his homestead notice.

The local land office held in favor of Carter, and upon appeal the Commissioner of the General Land Office held in his favor, as did likewise the Secretary of the Interior, holding that Carter's residence was established in good faith and in the belief that his dwelling was upon the land embraced in his homestead application, and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the N. E. 1/4 of said section, was a constructive residence on the N. E. 1/4 of said section, and that Carter should be permitted to make homestead entry upon said land, and that the railway company's selection thereof should be cancelled.

The railway company contends that the decision of the Land Department and the cancellation of the railway company's selection were erroneously made through a mistake of law in this, that it was held by said decisions in and by said decisions held that Carter's residence in a house situated upon the N. W. 1/4 was constructively and within the meaning of the Homestead Law involved in this suit. The United States issued a patent to Carter and Carter subsequently conveyed the land to the defendant in error. The prayer of the amended complaint is that the appellant be decreed to be the owner of the premises de-

a settlement upon the land

scribed in said patent, and that the respondents be required to convey the same to the appellant.

The final decision by the Secretary of the Interior in favor of Carter is dated November 23, 1905 (Record, p. 26). The conveyance by Melvin J. Carter and Clara Carter, his wife, to James A. Hower as trustee is dated July 9, 1906 (Record, p. 8). This suit was not brought before April, 1908. Prior to the beginning of this suit defendants in error, Hower and Nonpareil Consolidated Copper Company, had acquired an interest in the land (Record, p. 8). There is no allegation in the complaint of notice of the plaintiffs' claims between the date of the Secretary's final decision November 23, 1905, and the beginning of this suit April, 1908.

A settlement by Melvin J. Carter, the homestead claimant, is found to have been made September, 1893 (Record, p. 18). A hearing before the Register and Receiver was first ordered May 27, 1899, and continued from time to time to June 1st, 1903, and a decision by the Register and Receiver was made August 28, 1903, holding, "There can be no question that the law has been complied with, both as to residence and improvement to the place and that the commencement of such residence and improvements dates prior to the location of the said railway company" (Record, p. 18).

Upon appeal to the Commissioner of the Land Office that official concurred in the finding of the Register and Receiver, except as to the location of the improvements and ordered a further hearing (Record, p. 22). Upon their report the acting Commissioner held as follows:

> "I, therefore, have no doubt of the good faith of Carter in his present application, and he now offers to amend his application so as to include the land which the Government finally determines his improvements are placed upon,

and to drop from either the eastern or the southern boundary of his claim sufficient land to enable him to include the actual tracts upon which his improvements are located; provided the Department finally holds that his homestead improvements are not upon the N. E. 1/4.

The patenting of Lot 2 to E. B. Carter and Lot 1 which lies between him and the N. E. 1/4 to the railway company, place them beyond the jurisdiction of this office, and the suggested adjustment can not be had, and the only relief that can be extended to him is to award him the N. E. 1/4, upon the principle of constructive residence, which, I think, may in all equity and justice be applied in his case; he made some improvements on the N. E. 1/4, believed he was residing on that quarter and lived there six years in that belief, and made application for that tract, so believing; therefore under the decisions of the department in Kendrick *v.* Doyle, 12 L. D., 67; Noe *v.* Tipton, 14 L. D., 447; Staples *v.* Richardson, 16 L. D., 248, and others, I rule that Carter's residence in good faith in a house believed to be upon the land, covered by his application is a constructive residence on such land, and that since said residence antedates the selection of the railroad company he had the better right thereto.

I therefore hold the company's selection of the said N. E. 1/4 for rejection, subject to appeal, with a view to permitting Melvin J. Carter to perfect homestead entry thereof should this decision become final" (Record, p. 23).

Upon appeal to the Secretary of the Interior a final decision was handed down November 23, 1905

(Record
cided, a pp. 26 to 29), in which the Secretary de-
nong other things, as follows:

c "It is evident from the testimony and cir-
Gmstances in the case that when Melvin J.
rarter purchased the cabin and improve-
ients of Doolin and built the new house
lto which he moved with his family, the
cnd being then unsurveyed, he intended to
paim land extending to the east of said im-
bovements. This is shown from the fact he
nilt the barn, made the trails and posted
btice of his claim over a quarter of a mile
» the east, as shown in the case. It does
ot appear why he did not apply for Lot 1,
l fractional N. E. 1/4 of N. W. 1/4, situated
ltween his house and the land applied for.
(does appear however, that several surveys
f the land, either public or private, had been
:ade, and that the situation was confusing
« to the lines and stakes even to those ac-
astomed to looking up lines and corners.
«s Carter tendered his homestead application
:rectly after the filing of the plat, presum-
bly he still believed that his house was
cated on the N. E. 1/4.

lAs he is shown to have been a *bona fide*
bmestead settler upon unsurveyed land at
le time the railway company made selection
iereof, and subsequently has made a good
impliance with the law as to residence and
bprovements, the Department is of the
binion that his application for the tract in
uestion should be allowed. As the railway
impany made selection of the entire section,
lloses no more land that it would if Carter
id applied for said lot 1 with sufficient in the
E. 1/4 to make 160 acres.

Your office decision holding in favor of

Carter is affirmed and upon his perfecting his application for said N. E. 1/4 of Sec., 2, T. 27, N. R. 10 E., the railway company's selection thereof will be cancelled."

Argument.

Upon compliance by Carter with the requirements of the department, the Government delivered to him final entry certificate for the land in question (Record, p. 8). This was an acknowledgment by the Government that it held the title in trust for the entryman, and would in due course issue to him a patent. Thereupon and not later than May 16, 1906, he became the equitable owner of the land.

U. S. *v.* Detroit Timber & Lumber Company, 200 U. S., 321.

On July 9, 1906, Carter and his wife conveyed to defendant in error, Hower.

On March 8, 1907, patent of the United States issued to Carter conveying to him the legal title to the said land. Thereafter an interest in the land was conveyed to defendant in error, Nonpareil Consolidated Copper Company, and both are purchasers for value, in good faith and without notice of the claims of the plaintiff in error. There is no intimation on the record that either Hower or the Nonpareil Consolidated Copper Company had knowledge or notice of plaintiff's claims or suspicion of any alleged invalidity of the title. This suit is an attempt to upset a legal title. In order to do that it must charge the defendants with notice of any alleged fraud. It is true, the complaint alleges that the secretary "wrongfully and in fraud of the rights of said railway company * * * held and decided" but this does not satisfy the settled rules of pleading as to fraud, and the demurrer does not admit that there was fraud nor is there any allega-

tion that the entryman participated therein nor of notice thereof to his grantees.

At the time of the conveyance to Hower, that is to say, after the delivery to Carter of the final certificate, Hower was not bound to hunt for grounds of doubt.

> United States *v.* Clark, 200 U. S., 601, 608, 609.

In that case the Court, per Mr. Justice Holmes, say at pages 607, 608:

> "The fact that Clark, while he had a merely equitable or personal claim against the Government, held it subject to any defect which it might have, whether he knew it or not, as generally is the case with regard to assigned contracts not negotiable, was not equivalent to actual notice of the defect. It is recognized in the Act of March 3, 1891, c. 561, Sec. 7, 26 Stat. 1095, 1098, that there may be a *bona fide* purchaser before a patent issues. The title when conveyed relates back to the date of the original entries. Therefore actual notice must be proved."

The contention of the plaintiff-in-error here, as it was before the Supreme Court of the State of Washington, is that the decisions of the Commissioner of the General Land Office and of the Secretary of the Interior allowing Carter to make homestead entry of the land in question and cancelling the Railway Company's selection thereof were wrongfully and erroneously made through a mistake of law and that the denial of this claim by the decision and judgment of the Supreme Court of Washington was error (plaintiff's brief, p. 8) and the assignments of error are substantially on like ground. No precedents are cited in plaintiff's

brief here in support of the jurisdiction to correct the mistake of the officers of the Land Department. Before the Supreme Court of the State of Washington plaintiff cited and relied upon the following precedents in this Court:

Moore *v.* Robbins, 96 U. S. 530-535;
Baldwin *v.* Stark, 107 U. S. 463;
Bohall *v.* Dilla, 114 U. S. 47;
Lee *v.* Johnson, 116 U. S. 48;
Gonzales *v.* French, 164 U. S. 342.

In each of these cases the patent of the United States was supported against an attempt to set it aside, and in none of these cases had the right of a *bona fide* purchaser intervened.

But in the case at bar, the rights of *bona fide* purchasers have intervened. The defendants-in-error are *bona fide* purchasers for value and without notice, and their rights will be protected by this Court.

U. S. *v.* Burlington, 98 U. S. 334;
Colo. Coal & Iron Co. *v.* U. S. 123 U. S. 307;
U. S. *v.* Cal. & O. Land Co., 148 U. S. 31.

In *U. S.* vs. *California & Oregon Land Co.*, Mr. Justice Brewer said:

> "In United States *v.* Burlington & M. R. R. Co., 98 U. S. 334, it was said: 'It (the United States) certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees.' And, again in Colorado Coal & I. Co. *v.* United States, 123 U. S. 307, 313: 'It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly con-

> stituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a *bona fide* purchoser for value without notice is perfect.'"

In this case no notice is alleged nor claimed nor is there a sufficient allegation of invalidity of title.

Then follows the issuance to Carter of patent of the United States, dated March 8, 1907, and the acquiring of an interest in the said lands by the Nonpareil Consolidated Copper Company. At the time of the acquiring of these rights by Hower and the Nonpareil Consolidated Copper Company, there was no claim by the plaintiff or its predecessor in title to the said property. The selection by the St. Paul, Minneapolis & Manitoba Railway Company of the said land was pursuant to the decision of the Secretary of the Interior, cancelled prior to March 16, 1906 (Record, p. 8). No action having been taken by the said last named company to protect its alleged rights from March 16, 1906, to November 1st, 1907, on said day it conveyed its alleged right, title and interest to the said land to the plaintiff (Record, p. 9). The plaintiff had notice that there was no selection pending nor any pending controversy in relation to the said alleged rights between the St. Paul, Minneapolis & Manitoba Railway Company and either Carter or his grantees or with the Government.

The allegation in the XXII paragraph of the complaint that the plaintiff became, by such transfer, the equitable owner of the said land, being a conclusion of law, is not admitted by the demurrer. The

plaintiff in error was not a *bona fide* purchaser and was affected with notice of the cancellation of the selection and of the issuance of and delivery of the final certificate and the issuance of the patent of the United States.

It follows that the plaintiff and its predecessor were guilty of gross laches in lying by from November 23, 1905, to April, 1908, and permitting the defendants in error to invest their money on the faith of the uncontested equitable and legal title vested in their grantor and this Court, even if the contention were not urged by the defendants in error may of its own motion adopt such laches as a sufficient reason for the affirmance of the judgment of the Supreme Court of the State of Washington.

The third ground of the demurrer (p. 11) is "that there is a defect of parties defendant in that the original patentee Carter, described in the amended complaint, should be made a party." The amended complaint alleges that the patent was issued to Carter conveying to him the legal title to said land (Record, p. 8).

It follows that the title was subsequently conveyed by Carter. The complaint does not state whether the deed from Carter contained a warranty or not. The most usual form of deed contains a warranty. If there was included in the deed from Carter any of the usual covenants he would be liable for any breach of such covenants and should have been made a party. The object of the action was practically an annulment and vacating of the patent to the land and whatever consideration Carter received for his conveyance might, after an adverse judgment, be demanded of him by his grantee.

In the event of a decision in favor of the plaintiff a suit against Carter would result and he was therefore a necessary party. It cannot be said that Carter is not vitally interested in the controversy and that he might not be affected by a decree.

There is no disputed question of fact to be considered by the Court. All of the matters involved have been the subject of investigation by the department. The only claim insisted upon is that there was a mistake of law by the department. Carter could not, as matter of fact, in any new suit dispute or controvert the facts found in this suit, though as matter of law he might have the right to do so.

There is no proposition more firmly established by the adjudications of this court than that in the absence of fraud or mistake, the decisions of the Land Department upon questions of fact in all matters properly before it, must be regarded as conclusive, and where a patent has issued and transfers have been made to others, the rights so acquired can be overturned only upon the clearest evidence, but where the doubt rests upon a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

Marquez *v.* Frisbie, 101 U. S., 800;
Shepley *v.* Cowan, 91 U. S., 331;
Lee *v.* Johnson, 116 U. S., 49.

The allegation of fraud in the complaint is by way of inducement and not supported by any allegations of facts constituting fraud. It is a mere conclusion of the pleader and therefore the demurrer does not admit that there was fraud. Likewise as to the alleged mistake of law, that also is a conclusion of law and the demurrer does not admit that there was such a mistake.

The prevailing and long continued construction of the act by the Land Department is entitled to great weight in determining the questions raised.

Hewitt *v.* Schultz, 180 U. S., 139.

Here, the Court (Mr. Justice Harlan writing) say, at page 157:

> "It is the settled doctrine of this court, 'as was said in United States *v.* Alabama Great Southern Railroad, 142 U. S. 615, 621,' that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with its execution, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

This was followed in the case of Moore *v.* Cormove, 180 U. S. 167, which was a writ of error to the Supreme Court of the State of Washington.

As well stated in the opinion below, the United States Land Department has repeatedly held that a settler constructively residing upon lands claimed by him should be permitted to acquire title. The Court point out that in most of the cases which the appellant there cited (being the same cases cited in the brief for plaintiff-in-error here), the land had been surveyed before the settlement or improvements were made and the Court further observe, that not only was the land in question here unsurveyed, but the facts found and pleaded show that in places it was rough, uneven and difficult of access. Nowhere in the pleadings or in the record is any imputation upon the good faith of the entryman. On the other hand, the findings and decisions of the Land Department show his entire good faith.

The Acting Commissioner of the General Land

Office in his decision of June 30, 1905 (Record, pp. 24 and 25), says:

> "It appears that two parties made settlement on what is now lot 2, one Billy Doolin, and, a short distance below him, Mr. Moe, the land being unsurveyed; that Melvin J. Carter and his father, E. B. Carter, went upon the land, September 19, 1893, Melvin buying the cabin and improvements of Doolin, and E. B. Carter, the like improvements of Moe, and that each built for himself and family new cabins on their claims, lived there and cultivated small tracts of the land, Melvin claiming what he supposed to be N. E. 1/4 of the section; that about a year after settlement he, with the assistance of his father, constructed trails across the section and up Trout Creek for the purpose of getting to different places on the claim; that he built a barn and stable, which is also used for storing supplies, etc., that he also posted near the north line a homestead notice.
>
> All these things, the notice, trails and barn are shown since the survey to be on the N. E. 1/4, but the house and cultivated ground are on the N. W. 1/4 about a quarter of a mile west of the quarter section line, between the northeast and the northwest quarters.
>
> It is advanced in argument by the company that these improvements on the N. E 1/4 were made after its selection; but that is not material since they were made in furtherance and continuance of a settlement made prior to such selection and with relation thereto.
>
> As an earnest of his belief it may be observed as shown by the records, that upon survey his father, E. B. Carter, appropriated as the land he claimed, the lot 2 (on which

both are living) the S. W. 1/4 N. W. 1/4 and the N. 1/2 S. W. 1/4 of the section, made homestead entry and final proof thereof and has received his patent therefor without protest from his son; further, the railway company had selected the whole section, yet Melvin Carter made no protest against its claim to the N. W. 1/4, but allowed it to obtain patent for Lot 1, or fractional N. E. 1/4 N. W. 1/4 and the S. E. 1/4 N. W. 1/4, which lot 1 immediately adjoins on the east Carter's home. E. B. Carter evidently claimed south from his home, while Melvin J. Carter was claiming east from his, neither supposing he was interferring with the other, Melvin believing he was over on the N. E. 1/4. I, therefore, have no doubt of the good faith of Carter in his present application."

And the Secretary in his decision of November 23, 1805, says:

"An examination of the testimony shows the facts to be substantially as set forth in your office decision, and shows that while Carter was away much of the time, working to earn money for the support of himself and family, he had no other home and his family steadily resided in the house he built, except during the winter seasons when they were obliged on account of deep snows and high water from the river, situated near by, to go elsewhere temporarily; that his wife helped clear the land, set out trees and shrubbery and raised vegetables from year to year. His residence and improvements seem to have been ample."

And thus the comparison of the equities between the entryman and the St. Paul, Minneapolis & Manitoba Railway Company is this:

The entryman, as the Secretary found after careful consideration, acted with the utmost good faith and in the belief that all of his improvements were upon the land here involved. By virtue of his improvements and the honesty of his intention regarding his application for the land, he had made constructive residence thereon sufficient to comply with the homestead laws of the United States. These facts were known to the Railway Company and it was in its power to substitute other lands in place of the lands selected. The Railway Company proceeded in its attempt to get these particular lands and to deprive the entryman and his family of the just fruits of their long years of toil. The Railway Company's demand was rejected by the Department after full and fair consideration and patent issued to the entryman.

We thus come to a consideration of the comparative equities of the present plaintiff and the defendants. The St. Paul, Minneapolis and Manitoba Railway Co., after the adverse decision of November, 1905, rested upon its rights and did nothing whatever, permitted the entryman to expend the sums necessary to obtain his final certificate and patent and permitted several transfers of the property.

After two years, that is, in November, 1905, the St. Paul, Minneapolis & Manitoba Ry. Co., transferred to the plaintiff. But what did it transfer?—A mere possibility of a lawsuit. It had no title, legal or equitable, to any of said land. It had made no claim upon the patentee or upon his grantees and it is not alleged that the plaintiff gave anything of value for such right or took it

into consideration in accepting the transfer from the St. Paul road; but if plaintiff was a purchaser for value, it surely did not purchase in good faith, for if it had inquired the facts would have appeared, and if there was a failure to make inquiry such failure sufficiently characterizes its good faith. On the other hand, the defendants, as hereinabove stated, are purchasers for value in good faith and without notice and without any indication to put them upon notice or inquiry. In view of these considerations and those hereinabove inadequately stated in this brief, we respectfully submit that the judgment appealed from should be affirmed.

J. A. COLEMAN,
Attorney for Defendants in Error.

EUGENE G. KREMER,
Of Counsel.

GREAT NORTHERN RAILWAY COMPANY *v.* HOWER.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 88. Submitted November 11, 1914.—Decided March 22, 1915.

Bona fide purchase is an affirmative defense which the grantee must set up in order to defeat the claim of one seeking to have a trust declared in lands patented, if the bill is otherwise sufficient.

Rev. Stat., § 2291, is specific in its requirements that in order to obtain a patent for a homestead, the applicant must have actually resided upon or cultivated the same for a term of five years.

While the law deals tenderly with one going in good faith on the public lands, with a view of making a home thereon, the right is a statutory one, and, in such a case as this, it is essential to show compliance with the statute as a prerequisite to obtaining a patent.

Although acting in good faith, settlement upon land other than that included in the entry is not sufficient; and in this case so *held* as to an entry for one quarter-section where the entryman, through mistake, built his home on another quarter-section and at a point about one-quarter of a mile from the land entered, notwithstanding he did make a trail and build a stable on the land entered.

69 Washington, 380, reversed.

THE facts, which involve the construction of Rev. Stat., § 2291, and the necessity of the homesteader making improvements on the land entered, are stated in the opinion.

Mr. E. C. Lindley, *Mr. Thomas R. Benton*, *Mr. F. V. Brown* and *Mr. F. G. Dorety* for plaintiff in error.

Mr. Eugene G. Kremer and *Mr. J. A. Coleman* for defendants in error:

In *Moore* v. *Robbins*, 96 U. S. 530, 535; *Baldwin* v. *Stark*, 107 U. S. 463; *Bohall* v. *Dilla*, 114 U. S. 47; *Lee* v. *Johnson*, 116 U. S. 48; *Gonzales* v. *French*, 164 U. S. 342, relied on by plaintiff in error, the patent of the United States was supported against an attempt to set it aside,

and in none of these cases had the right of a *bona fide* purchaser intervened.

In this case, the rights of *bona fide* purchasers have intervened. Defendants in error are *bona fide* purchasers for value and without notice, and their rights will be protected by this court. *United States* v. *Burlington*, 98 U. S. 334; *Colorado Coal Co.* v. *United States*, 123 U. S. 307; *United States* v. *Cal. & Ore. Land Co.*, 148 U. S. 31.

There is no disputed question of fact to be considered by the court. All matters involved have been the subject of investigation by the Department. The only claim insisted upon is that there was a mistake of law by the Department. Carter could not, as matter of fact, in any new suit dispute or controvert the facts found in this suit, though as matter of law he might have the right to do so.

In the absence of fraud or mistake, the decisions of the Land Department upon questions of fact in all matters properly before it, must be regarded as conclusive, and where a patent has issued and transfers have been made to others, the rights so acquired can be overturned only upon the clearest evidence, but where the doubt rests upon a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. *Marquez* v. *Frisbie*, 101 U. S. 800; *Shepley* v. *Cowan*, 91 U. S. 331; *Lee* v. *Johnson*, 116 U. S. 49.

The prevailing and long continued construction of the act by the Land Department is entitled to great weight in determining the questions raised. *Hewitt* v. *Schultz*, 180 U. S. 139; *Moore* v. *Cormove*, 180 U. S. 167.

Mr. Justice Day delivered the opinion of the court.

The Great Northern Railway Company filed its amended complaint against James A. Hower, individually and as

Trustee, Anna H. Hower, his wife, Nonpareil Consolidated Copper Company, Nicholas H. Rudebeck, and James McCreery Realty Company, in the Superior Court of the State of Washington, in and for the county of Snohomish, seeking to establish title to the northeast quarter of Section 2, Township 27 north, Range 10 east, Willamette Meridian, in said county and State. Defendants appeared and demurred upon the ground, among others, that the amended complaint did not state facts sufficient to constitute a cause of action. The Superior Court sustained the demurrer, and upon appeal to the Supreme Court of the State of Washington, judgment on the demurrer dismissing the suit was affirmed (69 Washington, 380), and the case was brought here.

Various paragraphs of the bill allege the selection of the lands in controversy by the complainant's grantor, the St. Paul, Minneapolis & Manitoba Railway Company, under the provisions of the act of Congress of August 5, 1892 (c. 382, 27 Stat. 390), which selection was made on March 24, 1894. Other paragraphs of the bill allege the filing of an application by one Melvin J. Carter on April 18, 1899, in the District Land Office to enter the northeast quarter of Section 2, Township 27 north, Range 10 east, under the homestead laws of the United States, Carter claiming that he had settled on the land December 1, 1893. The complaint recites the controversy between the Railway Company and Carter before the district land officers, and the taking of testimony, which, it is alleged, showed that Carter on September 19, 1893, purchased the improvements of a former settler upon a tract of unsurveyed land on the left bank of the north fork of the Skykomish River a short distance below the mouth of a tributary of said river known as Trout Creek; that he thereupon established a residence in the cabin of the former settler, and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he moved his

family into this dwelling house and had continued to reside therein and on said land with his family to the time of said hearing; that his improvements consisted of the dwelling house and a small clearing in which he set out trees and shrubbery and raised vegetables from year to year. It is alleged that the evidence taken at the hearing further showed that Carter's improvements were all situated on the left bank of the north fork of the Skykomish River, about two or three hundred feet from said river and about one-half mile below the mouth of said Trout Creek, and not upon the land applied for by Carter under the homestead law; that on the evidence alleged, the register and receiver, on August 28, 1903, held and decided that Carter had duly settled upon the land claimed by him during the month of September, 1893, and had continued to reside upon, improve and cultivate said land to the time of said hearing on June 1, 1903, and that he should be allowed to enter the land applied for under the homestead law and that the railway company's selection thereof should be cancelled.

It was further charged that upon appeal to the Commissioner of the General Land Office, the Railway Company alleged among other things that the evidence showed that the dwelling house and other improvements of Carter were not on the land selected by said railway company and applied for by Carter, but were and at all times had been situated more than three-eighths of a mile from said land; that the Commissioner of the General Land Office, on March 23, 1904, held and decided that said Carter had settled upon the land upon which his improvements were made in the fall of 1893, and that he had commenced his residence thereon with his family in the spring of 1894 and had continued to reside upon and improve same. The Commissioner further held that the evidence taken tended to show that Carter's improvements were all situated on the Northwest Quarter of

Section 2, Township 27 north, Range 10 east, and not on the Northeast Quarter of said Section 2, and ordered a further hearing.

It was alleged that on the further hearing before the register and receiver of the Seattle Land Office on December 16, 1904, the evidence conclusively showed that the improvements, including the dwelling house and residence of Carter, were all situated on Lot 2 of said Section 2, Township 27 north, Range 10 east; that said Lot 2 is located in and is a part of the Northwest Quarter of the Northwest Quarter of said section, and that the east line of said lot is located a quarter of a mile west of the west line of the Northeast Quarter of Section 2; that the evidence taken at the hearing further showed that at some time prior to said hearing Carter had constructed or taken part in the construction of a trail up Trout Creek and extending over and across a part of the Northeast Quarter of Section 2; that about the year 1899 there had been constructed on the northwesterly part of the Northeast Quarter of Section 2 a small stable or barn and that Carter had at times used said stable or barn for storage purposes; and that upon the evidence taken at said rehearing the register and receiver of said Seattle Land Office held and decided, on January 21, 1905, that all of said Carter's improvements were located on said Lot 2 of said Section 2.

The complaint further alleged that on the thirtieth day of June, 1905, the Commissioner of the General Land Office, on the evidence taken at the rehearing, held and decided that on September 19, 1893, Melvin J. Carter purchased the claim, cabin and improvements of a former settler; that he built for himself and family a new cabin on the claim purchased; that he lived in the cabin and cultivated a small tract of land on the claim; that about a year after his settlement Carter constructed trails across Section 2 and up Trout Creek for the purpose of getting to dif-

ferent places on his claim; that he also built a barn or stable and used it for storing supplies; that a part of the trails and the stable or barn were on the Northeast Quarter of Section 2, and that the dwelling house and cultivated land were all on the Northwest Quarter of said Section 2 about one-fourth of a mile west of the west line of the Northeast Quarter of said section; that notwithstanding that the evidence produced at said rehearing failed to show that Carter ever resided upon, improved or cultivated any part of the Northeast Quarter of Section 2, and did conclusively show that Carter's dwelling house and cultivated land and improvements, except only said trails and stable or barn, which were constructed after the railway company's selection of said land, were situated more than one-fourth of a mile from Northeast Quarter and the Commissioner of the General Land Office found such to be the facts, said Commissioner wrongfully and unlawfully, it is alleged, and in fraud of the railway company's rights to the land and to complete its selection thereof and to receive the patent of the United States therefor, held, as a matter of law, that Carter's residence was established and maintained in good faith and in the belief that his dwelling house was upon the land embraced in his homestead application and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the Northeast Quarter of said Section 2, was a constructive residence on said Northeast Quarter, and that said Carter should be permitted to make homestead entry of said land and that the selection thereof by the St. Paul, Minneapolis & Manitoba Railway Company should be canceled.

The complaint further alleged that the Railway Company appealed to the Secretary of the Interior from the decision of the Commissioner of the General Land Office, alleging that Carter's dwelling house and improvements were situated more than a quarter of a mile from the

Northeast Quarter; that he had never resided upon, occupied, cultivated or in any manner improved the land embraced in his homestead application; and that his acts did not constitute a settlement upon said Northeast Quarter within the meaning of the homestead law; that on the twenty-third day of November, 1905, the Secretary of the Interior passing on said appeal, held the facts in the case to be as found by the Commissioner in his decision, and on the facts, wrongfully and in fraud of the right of the Railway Company to said land, held and decided as a matter of law that as Carter was shown to have been a *bona fide* homestead settler upon unsurveyed land at the time the Railway Company made selection of the Northeast Quarter of said Section 2 and subsequently complied with the law as to residence and improvements, he was constructively a settler upon said Northeast Quarter, and that his application to enter the land under the homestead law should be allowed and the selection thereof by the Railway Company canceled.

It was further averred that the Railway Company's selection of the Northeast Quarter of Section 2 was canceled, pursuant to the decision of the Secretary of the Interior, and that afterwards, on the sixteenth day of March, 1906, said Melvin J. Carter was permitted to make, and did make, homestead entry on the Northeast Quarter of Section 2, and that on May 16, 1906, he made the final proofs required, and received a final entry certificate for the land; and that thereafter, on the eighth day of March, 1907, patent of the United States was issued to Carter, conveying to him the legal title to said lands.

It is also averred that the decisions of the Commissioner of the General Land Office and the Secretary of the Interior, and the cancellation of the Railway Company's selection, were wrongfully and erroneously made through a mistake of law, in this, that it was in and by said decisions held that the settlement and residence of Carter

upon a tract of land situated one-fourth of a mile distant from the land sought to be entered by him was constructively, and within the meaning of the homestead law of the United States, a settlement upon the land last mentioned.

It was further averred, that on the ninth day of July, 1906, prior to the issuing of patent of the United States to Carter, said Melvin J. Carter and Clara Carter, his wife, granted to the defendant, James A. Hower, as Trustee, their right, title and interest in said Northeast Quarter of Section 2, Township 27 north, Range 10, east, and that the beneficiaries of the trust created by the deed, or the terms and conditions thereof, are not set forth in the deed, and plaintiff has no knowledge or information concerning the beneficiaries or the terms and conditions of the trust; and it was further averred that the defendant Nonpareil Consolidated Copper Company claims an interest or estate in said Section 2 adverse to plaintiff, but that plaintiff has no knowledge or information concerning the nature or extent of the interest so claimed. A like allegation is made as to the defendants Nicholas H. Rudebeck and James McCreery Realty Company. It is averred that the interest of the said defendants, if any they have, is subsequent, subordinate and inferior to the claim of the plaintiff.

The prayer is that the plaintiff be adjudged the owner of the title, and the defendants decreed and required to convey the same to it.

The Supreme Court of Washington affirmed the judgment of the lower court, sustaining the demurrer, upon the ground that the decisions of the Land Department should be followed, and that Carter's homestead entry was duly and properly approved. Apart from this ground of decision, it is argued by the defendants in error that the judgment was properly sustained in view of the want of allegation that the defendants in error—purchasers, so far as

appears, in good faith, and without notice of the claims of the plaintiff in error—had knowledge or notice of the plaintiff's claims, or such notice as the law requires as to the alleged invalidity of the title as would deprive them of the rights of *bona fide* purchasers.

It will be noticed that the allegations of the bill are that the deed to Hower, as Trustee, was made on July 6, 1906, before the patents issued on the eighth day of March, 1907, to Carter, but after the hearings and decisions to which we have referred, and after May 6, 1906, when Carter made the final proofs of settlement and cultivation required by § 2291, Rev. Stat., and after he had received final entry certificate for the lands upon that date.

Under these circumstances, it is said the grantee had such title as might be conveyed, notwithstanding the patent had not issued, and the rights of a *bona fide* purchaser will be protected. *United States* v. *Clark*, 200 U. S. 601.

It is the contention of the defendant in error that it appearing in the complaint that the grantee had complied with the requirements of the law and everything was complete except the issuance of the patent, it was necessary to further aver that the purchaser had knowledge or notice of the supposed mistakes or wrongs charged in order to deprive him of the benefit which inheres in the position of a *bona fide* purchaser. And this it is contended is the effect of *United States* v. *Clark*, 200 U. S. *supra*. But the position of a *bona fide* purchaser is not to be assumed from the allegations of the complaint, which do no more than state the several transfers without any allegation showing affirmatively that the defendants are *bona fide* purchasers for value, in which event only could this defense be successfully made by demurrer to the complaint. *Bona fide* purchase is an affirmative defense, which the grantee must set up in order to defeat the right of the railroad company to have a trust declared in the lands in question, if the bill is otherwise sufficient for that purpose. This matter was

directly involved and considered in *Wright, Blodgett Company, Limited*, v. *United States*, decided February 23, 1915, *ante*, p. 397, and it is only necessary in this connection to refer to that case.

The question then is, was there sufficient compliance with the homestead law to entitle Carter to the benefit thereof? It is not contended that the courts may refuse to follow the conclusions of the Land Office, based upon testimony as to matters of fact, but the insistence is that there is here such a clear mistake of law upon the facts found as to entitle the complainant to the relief sought. As it is stipulated in the decision on the demurrer that the findings of the officers of the Interior Department may be looked to, they must be had in mind in addition to the facts already recited from the complaint. Upon the appeal to the Commissioner of the Land Office from the finding of the Register and Receiver, that official held:

"I, therefore, have no doubt of the good faith of Carter in his present application, and he now offers to amend his application so as to include the land which the Government finally determines his improvements are placed upon, and to drop from either the eastern or the southern boundary of his claim sufficient land to enable him to include the actual tracts upon which his improvements are located; provided the Department finally holds that his homestead improvements are not upon the N. E. ¼.

"The patenting of Lot 2 to E. B. Carter and Lot 1 which lies between him and N. E. ¼ to the railway company, place them beyond the jurisdiction of this office, and the suggested adjustment cannot be had, and the only relief that can be extended to him is to award him the N. E. ¼, upon the principle of constructive residence, which, I think, may in all equity and justice be applied in his case; he made some improvements on the N. E. ¼, believed he was residing on that quarter and lived there six years in that belief, and made application for that

tract, so believing; therefore under the decisions of the Department in *Kendrick* v. *Doyle*, 12 L. D. 67; *Noe* v. *Tipton*, 14 L. D. 447; *Staples* v. *Richardson*, 16 L. D. 248, and others, I rule that Carter's residence in good faith in a house believed to be upon the land, covered by his application is a constructive residence on such land, and that since said residence antedates the selection of the railroad company he had the better right thereto.

"I therefore hold the company's selection of the said N. E. ¼ for rejection, subject to appeal, with a view to permitting Melvin J. Carter to perfect homestead entry thereof should this decision become final."

Upon appeal to the Secretary of the Interior, it was decided, among other things, as follows:

"It is evident from the testimony and circumstances in the case that when Melvin J. Carter purchased the cabin and improvements of Doolin and built the new house into which he moved with his family, the land being then unsurveyed, he intended to claim land extending to the east of said improvements. This is shown from the fact he built the barn, made the trails and posted notice of his claim over a quarter of a mile to the east, as shown in the case. It does not appear why he did not apply for Lot 1, or fractional N. E. ¼ of N. W. ¼, situated between his house and the land applied for. It does appear, however, that several surveys of the land, either public or private, had been made, and that the situation was confusing as to the lines and stakes even to those accustomed to looking up lines and corners. As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the N. E. ¼.

"As he is shown to have been a *bona fide* homestead settler upon unsurveyed land at the time the railway company made selection thereof, and subsequently has made a good compliance with the law as to residence and improvements, the Department is of the opinion that his

application for the tract in question should be allowed. As the railway company made selection of the entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the N. E. ¼ to make 160 acres.

"Your office decision holding in favor of Carter is affirmed and upon his perfecting his application for said N. E. ¼ of Sec. 2, T. 27, N. R. 10 E., the railway company's selection thereof will be canceled."

The statute of the United States (Rev. Stat., § 2291) is specific in its requirements that in order to obtain a patent for a homestead the applicant must have actually resided upon or cultivated the same for a term of five years succeeding the filing of the claim, etc.[1]

The question therefore is, was an actual residence within the meaning of the statute sufficiently shown to comply with these provisions? It is true, as the Supreme Court of Washington stated in its opinion in this case, referring to the opinion of this court in *Ard* v. *Brandon*, 156 U. S. 537, 543, "the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon." This is as it should be, and the courts have shown a commendable disposition to uphold one who has acted in good faith in entering upon the public lands for this purpose. Nevertheless, the right is a statutory one, and in this case it was essential to show actual residence upon the land as a prerequisite to the granting of a patent and obtaining title to the same.

Conceding that Carter acted in entire good faith, and that he meant to comply with the law, it is nevertheless the fact that his settlement was upon, and the land cultivated was in, a different quarter-section from that which

[1] Since this case arose the statute has been amended so as to require a habitable house upon the land, and actual residence and cultivation for the term of three years. Act of June 6, 1912, c. 153, 37 Stat. 123; U. S. Compiled Stats., V. 2, § 4532.

he undertook to enter, and the quarter which he contends for was separated from the one which he occupied by a forty-acre tract. It is true that some time during his occupancy a trail was laid out, and a small stable constructed on the northeast quarter. But the fact remains that his residence and improvements by way of cultivation were upon a quarter-section entirely separate and apart from the one to which title is now claimed. It seems to us to be going too far to say that, because of the trail to the northeast quarter and the small stable thereon, and the notices posted upon it, there was a constructive residence on that quarter, although the actual residence was upon the other quarter.

We have been cited to no cases in the Land Department which go so far as is required in this instance in order to support title. We have been unable to find anything in our own decisions which would sanction such liberal treatment of the statutory requirement as to residence.

In *Talkington's Heirs* v. *Hempfling*, 2 L. D. 46, the house of the entryman was by mistake built thirty yards outside of the lines of his claim, and was occupied in good faith in the belief that it was on the land claimed. In *In re Lewis C. Huling*, 10 L. D. 83, the house was built just across the line in the belief that it was actually inside the limits and upon the land claimed by the entryman. In *Kendrick* v. *Doyle*, 12 L. D. 67, the entryman was honestly mistaken as to the limits of his claim, owing to conflicting surveys, and his house was built in a corner where the boundary line admittedly was in doubt, but the correct survey showed the house to be a little outside the line. In *Staples* v. *Richardson*, 16 L. D. 248, the entryman discovered that he had built his house outside his limits, and razed it and built another house inside the supposed limits, but found that house to be outside, and built a third house, this time within the line limits. In *Keogle* v. *Griffith*, 13 L. D. 7, the claimant's first dwelling was

about forty rods from his land boundary. Upon discovering the mistake he built another house upon the land entered. In *Lindsay* v. *Hawes*, 2 Black, 554, the claimant's dwelling house was on the boundary line of the land claimed. A similar situation existed in *Silver* v. *Ladd*, 7 Wall. 219. In each of these cases the residence was held sufficient to satisfy the requirement of the statute. On the other hand, both the Department and this court have held in a number of cases, that residence upon one tract of land will not support a preëmption or homestead claim to another and distinct tract, even where the claimant has made substantial improvements upon the latter. In *Guyton* v. *Prince*, 2 L. D. 143, the claimant had purchased from a railroad company a tract which adjoined that of his homestead entry; two cabins had been built upon the homestead land, one by Prince, besides a stable, smoke-house and other buildings. The land was cultivated after entry, but at no time did the claimant reside upon the land, contenting himself with a few stays of a week or two at a time, and living in his dwelling upon the land purchased from the railroad company. His claim to homestead was denied because of his failure to reside upon the land claimed. The case of *Thomas D. Harten*, 10 L. D. 130, is somewhat similar, the claimant having purchased a possessory right to a tract of land embracing the homestead attempted to be claimed, and resided on the tract purchased, intending thereby to claim the entire tract. When the land was surveyed, his house was found to be 200 feet distant from the line of the homestead, while his garden and spring, as well as some out-buildings, were on the homestead tract. He cultivated the homestead tract, and shortly after his homestead entry built a house upon the homestead tract, residing since his entry thereon one night each month, hoping thus to establish his residence. The Department held this to be no residence, however, and denied his

claim. In *re Edson O. Parker*, 8 L. D. 547, Parker made scrip location of unsurveyed land, and after the survey was made, made further entry under the homestead laws for the remaining three-quarters of the section. His residence and most of his improvements were on the scrip claim, until he made his homestead entry, when he removed upon the lands embraced in said entry. It was held that he was not a settler on the homestead land until he moved his residence thereon. In the case of *Warren Bowen*, 41 L. D. 424, the settler had made an entry for a quarter-section of some surveyed lands, and upon presenting his homestead proof he included the adjacent quarter of some unsurveyed lands. His dwelling house was situated on the latter tract, where he had resided and had cultivated some five acres in the adjacent tract. His title to the unsurveyed lands was denied for reasons not necessary to be set forth here, and as to the surveyed tract his claim was denied because of lack of residence upon the proper section. In *Ferguson* v. *McLaughlin*, 96 U. S. 174, it was held that under § 6 of the act of March 3, 1853, c. 145, 10 Stat. 244, a settler upon unsurveyed public lands in California has no valid claim to preëmpt a quarter-section, or any part thereof included in his settlement, unless it appears by the Government surveys, when the same are made and filed in the local land office, that his dwelling-house was on that quarter-section.

In *St. Paul &c. Ry.* v. *Donohue*, 210 U. S. 21, this court summarized the requisites concerning preëmptions and homesteads essential to the acquirement of the rights intended by the statute, and said, at page 33:

"As a result of this review of the legislation concerning preëmptions and homesteads and of the settled interpretation continuously given to the same, we think there is no merit in the proposition that a homesteader who initiates a right as to either surveyed or unsurveyed land, and

complies with the legal regulations, may not, when he enters the land, embrace in his claim land in contiguous quarter-sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract and that he does such acts as put the public upon notice of the extent of his claim."

In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the complaint, upon its face, made a case entitling the plaintiff in error to the relief sought. As we have said, the rights of a *bona fide* purchaser, if such exist in this case, must be affirmatively set up by answer and sustained by proof. In the brief for the defendants in error a contention is made that the plaintiff is estopped from asserting a claim to the quarter-section in question by reason of having wrongfully obtained a patent for the land actually settled upon by Carter and having failed or refused to surrender that tract when the contest was pending in the land office, but it is enough to say of this that the facts upon which the contention is rested are not sufficiently disclosed in the complaint to require or justify its consideration at this time. If there be facts warranting such a contention they should be distinctly set forth in the answer and appropriately proved.

We think the court below erred in sustaining the demurrer to the complaint, and it follows that its judgment must be reversed, and the case remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed.